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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-SIXTH SESSION (Vienna, 11 - 22 November 1996)

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I. INTRODUCTION

1. At the current session, the Working Group on International Contract Practices continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the preparation of a uniform law on assignment in receivables financing. [1] That was the third session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on

[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1993), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374 to 381.

security interests in general, which the Commission at its thirteenth session (New York, 14-25 July 1980) had decided to defer for a later stage.[2]

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. [3]

4. At its twenty-fourth session, the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower cost credit (A/CN.9/420, para. 16).

5. At its twenty-fifth session, the deliberations of the Working Group were based on a note prepared by the Secretariat, which contained provisions on a variety of issues, including form and content of assignment, rights and obligations of the assignor, the assignee, the debtor and other third parties, subsequent assignments and conflict-of-laws issues (A/CN.9/WG.II/WP.87).

6. The Working Group, which was composed of all States members of the Commission, held the current session at Vienna from 11 to 22 November 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Chile, China, Ecuador, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Singapore, Slovak Republic, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

7. The session was attended by observers from the following States: Belarus, Cambodia, Greece, Indonesia, Ireland, Israel, Lebanon, Morocco, Pakistan, Qatar, Republic of Korea, Romania, Sweden, Switzerland, Syrian Arab Republic, Turkey and Venezuela.

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[2] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28, (UNCITRAL Yearbook, vol. XI:1980, part one, II, A).

[3] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (1994), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

8. The session was attended by observers from the following international organizations: Cairo Regional Centre for International Commercial Arbitration, Commercial Finance Association (CFA), Hague Conference on Private International Law, Fédération Bancaire de l'Union Européenne, Federación Latinoamericana de Bancos (FELABAN) and Interamerican Bar Association (IABA).

9. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Ross Masud (Pakistan)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.88) and three notes prepared by the Secretariat containing newly revised articles of the draft Convention on Assignment in Receivables Financing, comments submitted by the Permanent Bureau of the Hague Conference on Private International Law and comments submitted by the Commercial Finance Association (A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.90 and A/CN.9/WG.II/WP.91 respectively).

11. The Working Group adopted the following provisional agenda:

1. Election of officers

2. Adoption of the agenda

3. Assignment in receivables financing

4. Other business

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

12. The Working Group discussed draft articles 1 to 23 of the draft Convention on Assignment in Receivables Financing as set forth in the note prepared by the Secretariat (A/CN.9/WG.II/WP.89).

13. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapter III. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 23, as well as of the other articles of the draft Convention.

III. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

A. Title

14. Differing views were expressed with respect to the reference to the "financing" purpose of the assignment in the title of the draft Convention. One view was that such a reference should be deleted in view of the decision made by the Working Group at its previous session not to define the

substantive scope of the draft Convention by reference to the purpose of the assignment (see A/CN.9/432, paras. 16-18). Another view was that the title should broadly reflect the economic nature of the transactions intended to be covered by the draft Convention, namely assignments made for securing credit. It was recalled that, although the scope of the draft Convention was defined broadly under draft article 1, it was subject to a number of exceptions, currently listed in draft article 2. After discussion, the Working Group decided that the title of the draft Convention was generally acceptable. It was widely felt, however, that the discussion might need to be reopened after the Working Group had completed its review of the substantive provisions of the draft Convention.

B. Preamble

15. The text of the preamble as considered by the Working Group was as follows:

"The Contracting States,

"Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

"Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote commercial [and consumer] credit at more affordable rates,

"Have agreed as follows:"

16. The Working Group found the substance of the preamble to be generally acceptable. As a matter of drafting, various suggestions were made. One suggestion was that the words "commercial [and consumer] credit" should be replaced by a simple reference to "credit". After discussion, that suggestion was adopted by the Working Group. Another suggestion was that the words "at more affordable rates" were unnecessary and should be deleted. It was generally felt, however, that the availability of more favourable rates of interest was an important practical benefit expected from the draft Convention, which should be reflected in the preamble.

C. Consideration of draft articles

CHAPTER I. SCOPE OF APPLICATION AND GENERAL PROVISIONS

Article 1. Scope of application

17. The text of draft article 1 as considered by the Working Group was as follows:

"(1) This Convention applies to assignments of international receivables and to international assignments of receivables, if

"(a) [the assignor and the debtor have their places of business] [the assignor has its place of business]

in a Contracting State; [or

"(b) the rules of private international law lead to the application of the law of a Contracting State].

"(2) A receivable is international if the places of business of the assignor and the debtor are in different States. An assignment is international if the places of business of the assignor and the assignee are in different States.

"(3) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1)

Opening words

18. With respect to the substantive scope of application of the draft Convention, it was noted that the opening words of draft article 1 reflected the decision made by the Working Group at its previous session not to limit the scope of the draft Convention by reference to the "financing" or "commercial" purpose of the assignment (A/CN.9/432, paras. 16-18). It was also noted that the opening words of draft article 1 reflected the decision made by the Working Group at its previous session that the scope of the draft Convention should be broadly drafted to cover both assignments of international receivables and international assignments of domestic receivables, thus excluding only domestic assignments of domestic receivables (ibid., para. 24). The Working Group confirmed those two decisions by adopting the opening words of paragraph (1) unchanged.

Subparagraph (a)

19. Various views were expressed as to whether the places of business of the assignor, the assignee and the debtor should constitute relevant connecting factors for determining the applicability of the draft Convention to any given factual situation.

20. Under one view, the draft Convention should apply to all situations where the assignor had its place of business in a contracting State, with the exception of situations in which the debtor's interests were at stake and to which the draft Convention should apply only if the debtor too had its place of business in a contracting State. It was stated that retaining such a connecting factor would ensure both the broad applicability of the draft Convention and a sufficient level of certainty and predictability for all interested parties as to the circumstances under which the draft Convention would become applicable. In that connection, it was suggested that paragraph (1) of draft article 1 should be replaced by the following provisions:

"(1) Except as provided in paragraph (2), this Convention applies to assignments of international receivables and to international assignments of receivables if the assignor has its place of business in a Contracting State [at the time of assignment].

"(2) Notwithstanding paragraph (1), this Convention does not govern the rights and obligations of the debtor [with respect to the assignor or the assignee] unless either:

"(a) the debtor has its place of business in a Contracting State [at the time the original contract is concluded [or, if there is no original contract, at the time the receivable otherwise arises]]; or

"(b) the rules of private international law lead to the application of the law of a Contracting State to determine the rights and obligations of the debtor under the original contract."

21. Support was expressed in favour of retaining the place of business of the assignor as the only connecting factor, in view of the fact that the assignor would, in most instances, be a party to the dispute situations that the draft Convention was designed to address. It was generally felt, however, that the proposed text would result in excessively broadening the scope of the draft Convention. While the Working Group did not adopt the suggested text, it was generally agreed that the reference to the time of assignment was a useful element, which should be reflected in paragraph (2) (see paras. 27-31).

22. Another view was that the draft Convention should be applicable only where the assignor, the assignee and the debtor had their places of business in a contracting State. It was stated that, unless all interested parties had their places of business in a contracting State, the draft Convention might inappropriately cover situations where, under applicable rules of private international law, the law governing the assignment would be the law of a non-contracting State. While support was expressed in favour of that view, it was generally felt that retaining such a connecting factor might unduly narrow the scope of the draft Convention. In the discussion, the view was expressed that the right of the parties to opt out of the draft Convention by choosing the law of a non-contracting State needed to be further examined.

23. The prevailing view was that the draft Convention should be applicable where both the assignor and the assignee had their places of business in a contracting State. It was generally felt that, since the debtor was not a party to the assignment, and since the provisions of the draft Convention were intended not to change the legal position of the debtor, the place of business of the debtor should not be regarded as a relevant connecting factor for determining the applicability of the draft Convention. Concerns were expressed, however, as to practical difficulties that might arise from the need to determine the place of business of the assignee. For example, it was stated that, where an assignor assigned certain receivables to a syndicate of assignees, it might be difficult to determine whether all the assignees had their places of business in a contracting State. A question was also raised as to how the issue of conflicts of priority might be solved where a receivable had been assigned to a number of assignees, some of whom had their places of business in contracting States, while others had their places of business in non-contracting States.

24. After discussion, the Working Group decided that subparagraph (a) should read along the following lines "the assignor and the assignee have their places of business in a Contracting State". It was generally agreed, however, that the substance of subparagraph (a) might need to be reconsidered in the context of the future discussion on the issue of conflicts of priority and other substantive provisions of the draft Convention.

Subparagraph (b)

25. A concern was expressed that the reference to the rules of private international law might create uncertainty as to the applicability of the draft Convention. It was stated that the efficacy of the draft Convention in increasing the availability of credit was based on certainty and predictability as to which situations it governed. In response, it was stated that the reference to the rules of private international law provided a useful extension of the scope of application of the draft Convention. It was also stated that the uncertainty that might stem from disparities among applicable private international law rules would not be avoided by limiting the applicability of the draft Convention, since the rules of private international law also applied outside the scope of the draft Convention. After discussion, the Working Group adopted the text of subparagraph (b) unchanged.

Paragraph (2)

26. While there was broad support in the Working Group for both the principle and the formulation of paragraph (2), it was agreed that it needed to address the additional question of the time at which a receivable or an assignment had to be international for the Convention to apply.

27. Differing views were expressed as to how the issue of timing should be addressed. One view was that the internationality of both a receivable and an assignment should be determined at the time of assignment. In support of that view, it was observed that such an approach would enhance certainty and predictability as to the application of the draft Convention, since, under most circumstances, the parties would be able to determine the internationality of a receivable or an assignment at the time of the assignment. Another view was that the time at which the test of internationality should be met might differ depending on whether the internationality of a receivable or the internationality of an assignment was involved.

28. It was suggested that, for the draft Convention to apply, a receivable should be international at the time it arose, while an assignment should be international at the time it was made. In favour of determining the internationality of a receivable at the time it arose, it was pointed out that the suggested approach would provide protection for the debtor in the context of an assignment of future receivables. At the time the receivable arose, the debtor would know, through its contractual relationship with the assignor, that its creditor was located in a foreign country and that the assignment fell within the scope of the draft Convention.

29. While support was expressed in favour of the suggested approach, a number of concerns were expressed. One concern was that the suggested approach would create uncertainty since, at the time of the assignment, parties would not be able to determine whether the draft Convention applied to future receivables, as defined in draft article 3(5), i.e., receivables that arose after the assignment. Another concern was that a reference to the time at which a receivable "arose" might prejudge the question whether non-contractual receivables should be covered by the draft Convention and the question of the time at which a receivable "arose", dealt with in draft article 3(4).

30. After discussion, the Working Group decided that paragraph (2) should be redrafted to indicate that the test of internationality should be met, in the case of receivables, at the time they arose and, in the case of assignments, at the time they were made. It was generally agreed, however, that the above-mentioned concerns needed to be taken into account, and that the discussion might need to be reopened in the context of a review of draft article 3.

Paragraph (3)

31. The concern was expressed that, while a provision along the lines of paragraph (3) might be appropriate in a relationship involving two parties, it would be inappropriate in a tripartite relationship, in which third parties would have to determine what place had the closest relationship to the relevant contract and to find out what was known to, or contemplated by, the parties to that contract. In addition, it was observed that paragraph (3) might create uncertainty, particularly in an electronic-commerce environment, since there might be situations in which it would be impossible to determine the place of business of the parties with the closest relationship to the relevant contract (e.g., transactions concluded through Internet).

32. With a view to addressing those concerns, the suggestion was made that, instead of referring in paragraphs (1) and (2) to the place of business of the parties, reference should be made to their place of organization, which would always be a single place and one that would be easier to determine than the place of business, since it would be a matter of public record. That suggestion was objected to on a number of grounds. It was observed that the place of business worked well as a criterion for determining the internationality of a transaction and the territorial application of many legal texts and should, for that reason as well as for consistency reasons, be retained. In addition, it was stated that a reference to the place of organization of the parties would require additional provisions dealing with the location of physical persons. Moreover, it was pointed out that the suggested reference to the place of organization of the parties would not resolve the problem of multiple locations of the parties, since the term "place of organization" was not understood in the same manner in all legal systems. The example was given of the location of the head-office and of a branch of the same corporation, which in some legal systems could be understood as two different places of organization of the same corporation.

33. In the discussion, the suggestion was made that, in order to determine the place of business of the parties with the closest relationship to the relevant contract, reference should be made to the stipulations of the parties. That suggestion too was objected on the ground that such an approach could inadvertently result in allowing the parties to a contract to specify as the relevant place of business a place which might have no relationship to that contract whatsoever. After deliberation, the Working Group adopted paragraph (3) unchanged.

Form of instrument being prepared

34. In the course of the discussion of draft article 1, the view was expressed that the Working Group might wish to reconsider the working assumption adopted at its previous session as to the form of the instrument being prepared (A/CN.9/432, paras. 26-28). It was suggested that the text should take the form of a model law. It was stated that a model law would present the advantage of allowing enacting States flexibility in adjusting it to their national legislation and would thus be more likely to be accepted by States. That view failed to attract sufficient support. It was generally agreed that a convention would achieve a higher degree of certainty in the law applicable to assignments, which could have a positive impact on the availability and the cost of credit. After discussion, the Working Group confirmed its working assumption that the text being prepared should take the form of a convention.

"Opting-in" / "opting-out"

35. The Working Group considered the question whether a general opting-in clause (i.e., a clause that would result in the application of the draft Convention only if the parties to an assignment chose to subject their relationship to the draft Convention) should be included in the draft Convention.

36. In favour of an opting-in clause, it was stated that it would have the advantage of allowing parties to choose between the techniques provided for the transfer of receivables by the draft Convention and those currently existing under national laws. In addition, it was observed that an opting-in clause could make the draft Convention more acceptable to States. However, the prevailing view was that an opting-in clause would unnecessarily limit the cases in which the draft Convention would apply. It was generally felt that, in any case, the draft Convention was not aimed at replacing national assignment-related rules but rather at facilitating the increased use of assignment techniques in situations where an element of internationality was involved. In such situations, assignments were currently not widely practiced in view of the uncertainty prevailing under national laws with regard to their validity and enforceability. For that reason, it was said, the draft Convention dealt in draft article 21 with conflicts, inter alia, between assignments under national law and assignments under the draft Convention. After deliberation, the Working Group decided that the application of the draft Convention should not be made subject to an opting-in agreement of the parties to an assignment.

37. The Working Group next turned to the question whether an opting-out clause (i.e., a clause allowing the parties to exclude the application of the draft Convention) should be included in the draft Convention. It was noted that at its previous session the Working Group had agreed not to include a general opting-out clause, but to consider whether the parties should be allowed to exclude the application of the draft Convention, or to derogate from or vary the effect of its provisions that regulated their rights and obligations, in the context of each article (A/CN.9/432, paras. 33-38).

38. Differing views were expressed. One view was that, while the assignor and the assignee should be able to choose the law applicable to their transaction, such a choice should not affect the rights of the debtor and other third parties. It was observed that such a choice of law could create difficulties, in particular, in the context of subsequent assignments, since it could inadvertently result in some assignments being covered by the draft Convention, while other assignments would fall under the law chosen by the parties. It was stated that such an approach could jeopardize the certainty and predictability with regard to the rights of third parties, and thus have an adverse impact on the availability and cost of credit.

39. The prevailing view, however, was that the draft Convention should recognize party autonomy, which included the right of the parties to choose the law applicable to their mutual rights and obligations, as well as their right to derogate from or vary the effect of individual provisions of the draft Convention. In support of that view, it was observed that party autonomy was an important principle which should not be interfered with and the adoption of which would make the draft Convention more easily acceptable. In addition, it was pointed out that, in any case, the choice of law of the parties to a contract could affect only their mutual rights and obligations and not those of third parties. If the assignor and the assignee chose to exclude the application of the draft Convention, the draft Convention could still apply to the rights of the debtor and other third parties, if it were the law governing the original contract. It was observed that such an approach would be in line with the principle embodied in the draft Convention that the assignment should not change the rights and obligations of the debtor.

40. In the discussion, the question was raised whether the parties to the assignment only, or the parties to the original contract as well, should have the right to exclude the application of the draft Convention to their relationship. It was pointed out that assignors and assignees should have the right to determine the law applicable to their relationship. In addition, it was observed that debtors might have an interest in excluding the application of the draft Convention, in particular in view of the fact that, as a result of an international assignment of domestic receivables, their rights and obligations might be made subject to a legal regime that differed from the rules applicable to domestic assignments.

41. After consideration, the Working Group decided that the draft Convention should establish the right of the parties to the assignment and to the original contract to exclude the application of the draft Convention. With regard to the mandatory or non-mandatory character of the provisions of the draft Convention, the Working Group decided that the parties to the assignment should be able to derogate from or vary those provisions of the draft Convention that dealt with their mutual rights and obligations.

Article 2. Exclusions

42. The text of draft article 2 as considered by the Working Group was as follows:

"This Convention does not apply to assignments:

"[(a) for personal, family or household purposes;

"(b) between individuals as gifts ;

"(c) solely by endorsement of a negotiable instrument or delivery of a bearer document;

"(d) by operation of law;

"(e) that are part of the sale of a business out of which the assigned receivables arose;

"(f) of receivables owed by individuals;

"(g) of receivables from employment relationships;

"(h) of receivables from contracts under which the assignee is to perform the contract;

"(i) of receivables from reinsurance contracts;

"(j) of receivables from lease agreements relating to real estate and equipment;

"(k) of receivables from deposit accounts]."

43. The Working Group noted that the substance and structure of draft article 2 reflected the approach taken by the Working Group at its previous session, under which the scope of the draft Convention should be defined in broad terms, subject to the introduction in the text of a list of assignments, receivables and parties to be excluded from the scope of the draft Convention. Such an

approach responded to the decision made by the Working Group that: the focus of the draft Convention should be on assignments made in order to secure financing and other related services; but that other types of assignments might be covered as well by the draft Convention, as long as the text did not attempt to cover all assignments, which might be impractical and unnecessary (see A/CN.9/432, para. 66). It was also noted that the contents of draft article 2 were based on tentative suggestions made at the previous session of the Working Group (see A/CN.9/432, paras. 59, 63 and 65).

Subparagraph (a)

44. The Working Group found the substance of subparagraph (a), which was modelled on article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations Sales Convention"), to be generally acceptable. It was widely felt that assignments made for personal, family or household purposes were appropriately excluded from the scope of the draft Convention.

45. As to the question whether assignments of personal and family receivables made for financing purposes should also be excluded from the scope of the draft Convention, differing views were expressed. One view was that an additional provision was necessary to exclude such assignments from the scope of the draft Convention. It was stated that, in certain jurisdictions, the assignment of such receivables would be prohibited by mandatory law, which the draft Convention should not attempt to overrule.

46. The prevailing view, however, was that the assignment of personal and family receivables for financing purposes should not be prohibited by the draft Convention or excluded from its scope of application. The assignment of such receivables for financing purposes was said to be frequently used in practice and it was widely felt that the draft Convention should recognize and support those significant practices (e.g., securitization of credit-card receivables). After discussion, the Working Group adopted subparagraph (a) unchanged.

Subparagraph (b)

47. While the Working Group agreed that "gifts" should be excluded, a number of concerns were expressed as to the exact formulation of subparagraph (b). One concern was that the notion of "gift" used in subparagraph (b) was unclear and might create uncertainty, since it might be interpreted differently in various jurisdictions. In particular, uncertainty might exist as to whether a "gift" was to be understood as covering only a gratuitous transaction or whether it might also cover other types of transactions. It was generally felt that subparagraph (b) should be redrafted to indicate more clearly that assignments made gratuitously were excluded from the scope of the draft Convention.

48. Another concern was that the reference to "individuals" contained in subparagraph (b) might overly narrow the scope of the provision. It was generally felt that all assignments of the type considered under subparagraph (b) should be excluded from the scope of the draft Convention, irrespective of whether they were made by physical or by legal persons. It was agreed that the reference to individuals should be deleted from subparagraph (b).

49. After discussion, the Working Group adopted the substance of subparagraph (b) and requested the Secretariat to prepare a revised draft to address the above-mentioned concerns.

Subparagraph (c)

50. The Working Group found the substance of subparagraph (c) to be generally acceptable. It was generally felt that certain types of instruments normally transferred by way of a simple endorsement or delivery (e.g., bills of exchange, promissory notes or cheques) should be excluded from the scope of the draft Convention, since the draft Convention should not interfere with the operation of other international conventions that typically covered such instruments.

51. As a matter of drafting, however, concerns were expressed that the notions of "negotiable instrument" and "bearer document" were insufficiently precise and might lend themselves to diverging interpretations. For example, it was stated that uncertainty might exist as to whether a stand-by letter of credit could be regarded as a negotiable instrument. It was suggested that subparagraph (c) should focus on the means of transfer, i.e., the endorsement or delivery, rather than on the form of the instrument, and should thus be redrafted along the following lines: "solely by endorsement or delivery of an instrument". After discussion, the Working Group adopted subparagraph (c), subject to the suggested drafting change.

Subparagraph (d)

52. Differing views were expressed as to whether the draft Convention should cover assignments made by operation of law. One view was that assignments by operation of law should be excluded from the scope of the draft Convention, since such assignments were not commonly used for financing purposes. However, it was noted that such an exclusion already resulted from the definition of "assignment" under draft article 3(1), which referred to a transfer "by agreement". It was thus suggested that subparagraph (d) was unnecessary and should be deleted.

53. A contrary view was that transfers of receivables by operation of law should be covered by the draft Convention alongside assignments made by agreement. The example was given of assignments of tortious claims arising under insurance contracts, a practice that was said to be particularly important. It was also stated that legal mechanisms, such as subrogation, which might derive either from contract or from the operation of law should be covered by the draft Convention. In that connection, however, it was observed that subrogation was expressly covered by the definition of "assignment" under draft article 3(1).

54. The prevailing view was that assignments made by operation of law should be covered by the draft Convention only to the extent that such assignments might be used for financing purposes. It was generally felt that only those assignments that resulted automatically from the operation of law, such as assignments of receivables in the context of an inheritance process, should be excluded from the scope of the draft Convention. As a matter of drafting, it was suggested that subparagraph (d) should read along the following lines: "made automatically by operation of law". After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (d), taking into account the suggested wording.

Subparagraph (e)

55. The substance of subparagraph (e) was found to be generally acceptable. It was generally felt, however, that the scope of the provision should be broadened to address not only the situation where a business was sold, but also other situations where the ownership of that business might be modified, e.g., in case of a merger. The Working Group decided that the focus of the provision should be not on the nature of the transaction that modified the ownership of the business but on the assignment

being treated as an accessory element of that transaction. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (e) to reflect the decision.

Subparagraph (f)

56. The Working Group decided to delete subparagraph (f). It was generally felt that assignments of receivables owed by individual merchants and consumers were part of significant practices, such as securitization, that should not be excluded from the scope of the draft Convention.

Subparagraph (g)

57. Differing views were expressed as to whether subparagraph (g) should be retained. In favour of retention of subparagraph (g), it was stated that normally under national law the assignment of wages was prohibited or restricted with a view to protecting employees. The prevailing view, however, was that subparagraph (g) should be deleted. It was generally felt that the right of the employees to obtain credit based on their wages should be preserved, at least in cases in which such assignments of wages were not prohibited under national law. It was also agreed that retention of subparagraph (g) might inadvertently result in excluding from the scope of application of the draft Convention significant practices, e.g., practices involving the financing of temporary employment services. While draft article 10 led by implication to the result that statutory prohibitions of assignments were not covered by the draft Convention, the Working Group decided to delete subparagraph (g) and to address the question of statutory prohibitions of assignment in the context of draft article 10.

Subparagraph (h)

58. The Working Group found the substance of subparagraph (h) to be generally acceptable. It was widely felt that assignments of receivables from contracts under which the assignee was to perform the contract were not financing transactions and should thus be excluded from the scope of application of the draft Convention. As to the exact formulation of paragraph (h), it was suggested that reference should be made to situations in which not only the right to receive payment but also the obligation to perform the contract from which the receivable arose was being transferred. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (h) to reflect the above-mentioned suggestion.

Subparagraphs (i) and (j)

59. The Working Group decided to delete subparagraphs (i) and (j). It was generally felt that the assignment of insurance premiums, as well as the assignment of receivables from leases, involved significant financing practices that should be covered by the draft Convention.

Subparagraph (k)

60. Differing views were expressed as to whether subparagraph (k) should be retained. In favour of retention of subparagraph (k), it was stated that the assignment of deposit accounts raised complicated issues that might be difficult to address, including: whether the bank with which a deposit account was held would have a duty to pay the assignee; whether a bank's set-off would have priority over the claim of an assignee; and what would be the effect of an assignment of the credit balance in a deposit account to the bank that held that account.

61. The prevailing view, however, was that subparagraph (k) should be deleted. It was generally felt that the assignment of deposit accounts would, in any case, not be covered by the draft Convention, since normally it would be prohibited under national law. After discussion, the Working Group decided to delete subparagraph (k).

Article 3. Definitions

62. The text of draft article 3 as considered by the Working Group was as follows:

"For the purposes of this Convention:

"(1) 'Assignment' means the transfer by [written] agreement [of one or more, existing or future,] receivables[, or of partial and undivided interests in receivables,] from one or more parties ("assignor") to another party or parties ("assignee"), by way of sale, by way of security for performance of an obligation, or by any other way [, including subrogation, novation or pledge of receivables].

"[(2) 'Receivables financing' means any transaction in which value, credit or related services are provided for value in the form of receivables. "Receivables financing" includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing.]

"(3) 'Receivable' means any right of the assignor or another party or parties to receive or to claim payment of a monetary sum from another party or parties.

"(4) 'Original contract' means a contract from which a receivable arises. [A receivable 'arises' [when the original contract is concluded] [when it becomes payable] [when it is earned by performance] [when it accrues]].

"(5) 'Future receivable' means a receivable that might arise after the conclusion of the assignment.

"(6) 'Writing' means any form of communication that preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

"(7) 'Notification of the assignment' means a statement informing the debtor that an assignment has taken place.

"(8) 'Priority' means the right of a party to receive payment in preference to another party."

Paragraph (1) ("Assignment")

63. Broad support was expressed in the Working Group in favour of the substance of paragraph (1). The Working Group went on to consider the wording within square brackets and the exact formulation of paragraph (1).

"[written]

64. Doubts were expressed as to whether it was appropriate for the written form to be made an element of the definition of "assignment". A suggestion was made that the question of the form of the assignment should be dealt with only in the context of draft article 7. It was recalled that referring to the written form in the definition of "assignment" or only in a substantive provision establishing certain form requirements might entail different legal consequences as to the legal regime of purely oral assignments under the draft Convention.

65. After discussion, the Working Group decided to delete the reference to "written" assignments from paragraph (1), since it appeared unnecessary to place oral assignments outside the scope of application of the draft Convention. It was agreed that such oral assignments should be either recognized or invalidated by the draft Convention, a matter to be discussed in the context of draft article 7.

"[one or more, existing or future receivables]"

66. The Working Group agreed that the assignment of single receivables as well as the assignment of a pool of receivables, existing or future, should be covered by the draft Convention. As a matter of drafting, it was suggested that that result could be achieved even if the words "one or more" were to be deleted. Subject to that change, the Working Group decided to retain the reference to "existing or future receivables" without the square brackets.

"[partial or undivided interests in receivables]"

67. The Working Group decided to retain the reference to partial and undivided interests in receivables without the square brackets. It was observed that such receivables were often assigned in the context of significant transactions, such as securitizations, loan participations and loan syndications.

"from one or more parties"

68. It was generally agreed that the draft Convention should cover situations in which financing originated from several sources (e.g., loan syndications and loan participations). As a matter of drafting, it was suggested that the term "party" should suffice, since such a reference would be understood as including several parties. It was observed that that result might be more clearly achieved if the draft Convention were to include a rule of interpretation along the following lines "singular includes plural". The Working Group decided that situations in which one or more parties were involved should be covered and requested the Secretariat to reflect that decision in a revised draft of paragraph (1), taking into account the views expressed.

"by way of sale, by way of security"

69. It was observed that the reference to "sale" might be inappropriate in that it referred not only to the means, but also to the purpose, of the assignment.

"[including subrogation, novation or pledge of receivables]"

70. The view was reiterated that the draft Convention should establish a new type of assignment that would be available to those parties in international trade that would wish to opt for the

application of the draft Convention to their relationships. The suggestion was thus made that the reference to other techniques for transferring receivables should be deleted. That view failed to attract sufficient support. It was recalled that the Working Group had decided to cover assignment and related practices, subject to the right of the parties to exclude the application of the draft Convention to their mutual rights and obligations (see para. 41). The Working Group decided to retain the reference to assignment-related practices without the square brackets.

Paragraph (2) ("Receivables financing")

71. The Working Group noted that "receivables financing" was referred to in the title, the preamble and draft article 12(3). It was generally agreed that the definition of receivables financing was useful in that it clarified the types of practices to be covered by the draft Convention and should be retained. In the discussion, the attention of the Working Group was drawn to the need to ensure in draft article 5 that any potential conflicts between the draft Convention and the UNIDROIT Convention on International Factoring (Ottawa, 1988; hereinafter referred to as "the Factoring Convention") would be resolved in an appropriate way. After discussion, the Working Group decided to retain the definition of receivables financing unchanged.

Paragraph (3) ("Receivable")

72. It was noted that the definition of "receivable" was intended to cover a wide range of receivables, including: contractual (whether earned by performance or not) and non-contractual receivables; damages of any nature; receivables payable in any currency; receivables in a strict sense ("the right to claim") and proceeds of receivables ("the right to receive").

73. Differing views were expressed as to whether the assignment of non-contractual receivables should be covered by the draft Convention. One view was that non-contractual receivables should not be covered. In support of that view, a number of arguments were made, including that: tort receivables involved a great deal of uncertainty and that, as a result, their assignment was not a sufficiently significant financing practice; that the assignment of tort receivables raised a number of complicated issues (e.g., the definition of a future tort receivable, time of transfer and applicable law); and that covering tort receivables might make the draft Convention less acceptable to States.

74. The prevailing view, however, was that non-contractual receivables should be covered on the grounds that: significant financing practices involved the assignment of tort receivables (e.g., assignment of insurance claims); and that restricting the scope of application to contractual receivables would require that a distinction be drawn between contractual and non-contractual receivables, notions that were not universally understood in the same manner. After discussion, the Working Group decided that the broad scope of the definition of "receivable" should be retained so as to cover both contractual and non-contractual receivables.

75. The Working Group next turned to the question whether the notion of "receivable" should be limited to monetary receivables or expanded so as to cover other, non-monetary receivables (e.g., the right to receive precious metals, securities, goods or commodities).

76. One view was that the definition of "receivable" should be expanded to include precious metals and securities. It was observed that the lending of precious metals or securities (in which the borrower had to repay in kind or the monetary equivalent of the gold or securities borrowed) was a significant practice which the draft Convention should recognize. Another view was that the definition of "receivable" should be expanded even further so as to cover, e.g., rights to receive

goods or commodities. In that regard, a note of caution was struck in that such an approach might be overambitious and make the draft Convention less acceptable to States. In the same vein, it was observed that commodities were traded in organized markets, which were subject to special rules and should not be covered by the draft Convention.

77. After discussion, the Working Group approved the substance of the definition of "receivable" and requested the Secretariat to prepare a revised draft of paragraph (3), presenting variants to reflect the above-mentioned views and suggestions (for further discussion of the matter, see para. 137).

Paragraph (4) ("Original contract")

First sentence

78. It was observed that, in its present formulation, paragraph (4) did not make it sufficiently clear that the receivable arose out of the original contract as an asset that belonged to the assignor. It was thus suggested that the original contract should be defined by reference to the parties thereto (i.e., the assignor and the debtor). Subject to that change, the Working Group adopted the first sentence of paragraph (4).

Second sentence

79. Broad support was expressed in the Working Group in favour of a rule of interpretation dealing with the time at which a receivable "arose". It was generally felt that determining that time was important because it was referred to in the definition of "future receivable" and in several articles dealing with the time at which an assigned receivable was transferred (e.g., draft articles 8, 9, 23 and 24). In that context, it was observed that the time at which a receivable should be deemed as arising might be different, depending on whether a contractual or non-contractual receivable would be involved.

80. The Working Group considered first the question of the time at which a contractual receivable arose. One view was that the receivable should be treated as arising at the time when it became payable. That view was objected to on the ground that delaying the time at which a receivable arose could have adverse effects on the availability of credit. Another view was that a receivable should be considered as arising at the time when the original contract was concluded. It was observed that such an approach would enhance certainty and predictability, since at that time the identity of the creditor and the debtor, the legal source of the receivable and its amount would be known. While that view received broad support, it was pointed out that it might need to be supplemented by a reference to the time at which the original contract became enforceable. After discussion, the Working Group decided that a contractual receivable should be considered as arising at the time when the original contract was concluded.

81. The Working Group next exchanged views on the question of the time at which a non-contractual receivable arose. One view was that a tort receivable arose at the time at which the debtor and the legal source of the receivable could be identified. That view was objected to on the grounds that it introduced uncertainty as to the time when a tort receivable arose. It was pointed out that time was of importance, since, e.g., a tort receivable after confirmation by a court decision might be transformed into a contractual receivable, which by virtue of private international law rules would be made subject to a different law. Another view was that a tort receivable arose at the time when it was agreed upon by the parties or confirmed by way of a court decision. It was observed that such an approach would provide more certainty and would avoid raising problems of applicable law.

82. After deliberation, the Working Group requested the Secretariat to prepare a draft provision dealing with the time at which a non-contractual receivable arose, with possible variants taking into account the various views expressed in the discussion.

Paragraph (5) ("Future receivable")

83. The Working Group decided that the definition of "future receivable" should be considered in the context of the discussion of draft article 8(2) dealing with the time of transfer of future receivables (see paras. 109-114).

Paragraph (6) ("Writing")

84. The Working Group adopted paragraph (6) unchanged.

Paragraphs (7) and (8) ("Notification" and "Priority")

85. The Working Group decided to defer its discussion of paragraphs (7) and (8) until it had completed its review of draft articles 15 and 22-24 (see paras. 167 and 244 respectively).

Article 4. Debtor's protection

86. The text of draft article 4 as considered by the Working Group was as follows:

> "(1) An assignment does not have any effect on the debtor's duty to pay except that upon receipt of notification of the assignment the debtor is entitled to discharge its obligation, subject to article 16, by paying the assignee.
>
> "(2) An assignment does not prejudice the debtor's rights against the assignor arising from the failure of the assignor to perform the original contract."

Paragraph (1)

"An assignment does not have any effect on the debtor's duty to pay ..."

87. It was recalled that paragraph (1) expressed the fundamental principle that an assignment should not change the debtor's legal position, a principle embodied also in draft articles 16 and 17, which attracted broad support at the previous session of the Working Group (A/CN.9/432, paras. 89 and 244). Various views were expressed as to how that principle should be expressed in the draft Convention. One view was that the fundamental principle regarding the debtor's discharge of its obligation to pay was sufficiently reflected in draft article 16. It was thus suggested that paragraph (1) should be deleted. The prevailing view, however, was that a general provision expressly stating the principle that the assignment should not change the legal position of the debtor was needed in the earlier part of the draft Convention. Moreover, it was generally felt that the principle expressed in draft article 1 was broader in scope than draft articles 16 and 17, which dealt only with certain aspects of the legal position of the debtor. After discussion, the Working Group reaffirmed its decision that a general statement should be included in draft article 4. It was generally agreed that the principle should be expressed in broad terms, along the following lines: "An assignment does not have any effect on the legal position of the debtor".

"... except that upon receipt of notification of the assignment the debtor is entitled to discharge its obligation, subject to article 16, by paying the assignee."

88. As to the structure of paragraph (1), the view was expressed that it was inappropriate to combine in the same provision a general statement of principle, i.e., that the assignment should not affect the debtor's duty to pay, and an operative rule regarding only the effect of notification on the debtor's discharge of its obligation to pay. It was stated that such an operative rule would more appropriately be dealt with in the context of draft article 16, together with other rules regarding the effect of notification of an assignment on the debtor's discharge of its obligation to pay. In addition, it was stated that, as currently drafted, paragraph (1) might be misinterpreted as solving all the difficulties that might arise from the interplay of the general principle it reflected and the other provisions of the draft Convention.

89. It was pointed out that the question of the possible impact of the draft Convention on the debtor's legal position might need to be considered not only with respect to draft article 16, but also with respect to draft articles 10, 17 and 18. It was thus suggested that the words "except that upon receipt of notification of the assignment the debtor is entitled to discharge its obligation, subject to article 16, by paying the assignee" should be deleted. As an alternative suggestion, it was stated that, if the reference to draft article 16 was to be maintained, additional references to the effect of other provisions of the draft Convention on the legal position of the debtor might need to be considered in draft article 4. Yet another suggestion was that the only exception to the general principle expressed in paragraph (1) should be the case where the debtor consented to a change in its legal position as a result of the assignment.

90. The prevailing view was that, since draft article 16 was the only exception intended to be made by the draft Convention to the general principle that an assignment did not affect the debtor's legal position, draft article 4 should refer only to draft article 16. Possible conflicts between the principle established in draft article 4 and other provisions of the draft Convention, e.g., draft articles 17 and 18, might need to be discussed in the context of a review of those draft articles. It was agreed that, if additional conflicts could not be avoided, the discussion of draft article 4 might need to be reopened.

91. As to the substance of the exception contained in paragraph (1), the view was expressed that the words "the debtor is entitled to discharge its obligation by paying the assignee" were inappropriate, since they might be misinterpreted as allowing the debtor, after notification of the assignment, to continue paying the assignor and obtaining discharge of its obligation. It was stated that, subject to the provisions of draft article 16(3), the notification of an assignment should oblige the debtor to make payment to the assignee. As to how that obligation might be expressed, however, it was felt that the rule in paragraph (1) should be so drafted that the notification of an assignment could not be misinterpreted as creating, in itself, an obligation to pay. It was recalled that, as a result of a decision made by the Working Group at its previous session, the focus of draft article 16 had been changed from the debtor's duty to pay to the debtor's discharge (A/CN.9/432, para. 181). As a consequence of that decision, the debtor's obligation to pay should not be regarded as a matter for the draft Convention but for the original contract and the law applicable to that contract. It was thus suggested that the provision might be redrafted in terms of a positive obligation of the debtor to pay the assignee, subject to the original contract and to the law applicable to that contract.

92. While the suggested redrafting was found to be generally acceptable, it was suggested that the exception stated in paragraph (1) should also recognize that, upon notification, the debtor should conform to the payment instructions contained in the notification of the assignment. For example, where the notification specified that payment should be made not to the assignee but to a third party

or to the assignor, the debtor should obtain discharge of its obligation by paying to the party designated in the notification. It was recalled that, under draft article 16(3), the debtor, if so instructed in the notification, would have to discharge its obligation by paying the assignor.

93. After discussion, the Working Group decided that paragraph (1) should be redrafted along the following lines: "An assignment does not have any effect on the debtor's legal position except that upon receipt of notification of the assignment the debtor, subject to the original contract, if any, discharges its obligation by paying the assignee or by paying as instructed in the notification". As a matter of drafting, it was suggested that the word "discharges" might need to be replaced by the words "can only discharge", to avoid creating the impression that notification of an assignment, in itself, created a duty to pay.

Paragraph (2)

94. The Working Group generally agreed that paragraph (2) merely constituted an illustration of the principle stated in paragraph (1) and, as such, was superfluous. After discussion, the Working Group decided that paragraph (2) should be deleted.

General remark

95. At the close of the discussion of draft article 4, it was recalled that the decision made by the Working Group to establish the right of the parties to the assignment to vary individual provisions of the draft Convention (see para. 41) should be limited to their mutual rights and obligations. Thus, the assignor and the assignee should not be allowed to disregard the principle stated in draft article 4, which should be regarded as mandatory.

Article 5. International obligations of the Contracting State

96. The text of draft article 5 as considered by the Working Group was as follows:

> "This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement."

"This Convention does not prevail over any international agreement which has been or may be entered into"

97. It was suggested that the general reference to "any international agreement" might be insufficiently clear as to which agreements would prevail over the draft Convention in a given contracting State. It was stated that it would be of utmost importance for parties to receivables financing transactions to know with certainty which international texts would, in the view of a given contracting State, supersede the draft Convention. It was thus suggested that draft article 5 should contain a provision to the effect that contracting States would have the obligation to state in a declaration which instruments prevailed over the draft Convention. The view was expressed, however, that a system based on declarations made by States in the context of the ratification process might also raise uncertainties as to the effect of such declarations, in particular with respect to international agreements that might be entered into after the declaration was made.

"and which contains provisions concerning the matters governed by this Convention"

98. It was recalled that draft article 5 had been introduced in the draft Convention with a view to avoiding possible conflicts with other international instruments, such as the Factoring Convention. It was pointed out, however, that, while a provision along the lines of draft article 5 might be appropriate if the draft Convention dealt with issues of private international law, draft article 5 as currently drafted did not address negative conflicts (e.g., where another international instrument contained a provision that would mirror draft article 5), with the consequence that neither that instrument nor the draft Convention would apply. It was thus suggested that wording should be added to the text of draft article 5 to the effect that, where an international agreement contained a clause similar to that currently embodied in draft article 5, the draft Convention would prevail. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 5, reflecting the above-mentioned suggestions.

"provided that the assignor and the debtor have their places of business in States parties to such agreement"

99. The Working Group considered whether draft article 5 should be aligned with draft article 1(1)(a) in terms of which party should have its place of business in a State party to the international agreement that should prevail over the draft Convention. The view was expressed that, since the conflict-of-laws provisions of the draft Convention also covered the relationship between the assignor and the debtor, all three parties, i.e., the assignor, the assignee and the debtor, should have their places of business in a State party to the international agreement that should prevail over the draft Convention. The prevailing view, however, was that the proviso should be deleted. It was generally felt that the issue of which parties had to be in a State party to the international agreement that should prevail over the draft Convention should be left for determination by reference to the law applicable outside the draft Convention.

Article 6. Principles of interpretation

100. The text of draft article 6 as considered by the Working Group was as follows:

> "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

101. The Working Group found the substance of draft article 6 to be generally acceptable.

CHAPTER II. FORM AND CONTENT OF ASSIGNMENT

Article 7. Form of assignment

102. The text of draft article 7 as considered by the Working Group was as follows:

"Variant A

"An assignment need not be effected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

"Variant B

"An assignment in a form other than in writing is not effective [towards third parties]. [If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.]"

103. Support was expressed in favour of both variant A and variant B. In favour of variant A, it was stated that an assignee's right in the assigned receivables should be independent from formalities. It was also stated that adopting no form requirement for the assignment would be consistent with the absence of specific form requirements under most national laws with respect to the original contract between the debtor and the assignor, and to the underlying financing contract between the assignor and the assignee. It was further stated that variant A was the only approach acceptable under the national laws of a number of countries where imposing specific form requirements for assignment transactions would be regarded as contrary to the general principles of contract law.

104. The prevailing view was that variant B was, in substance, preferable to variant A. It was recalled that, in view of the broad definition of "writing" adopted under draft article 3(6) (see para. 84), Variant B would only invalidate purely oral assignments. Although examples were given of practices where certain cross-border assignments might be concluded by telephone without being subsequently confirmed in writing, it was widely felt that even such informal practices would imply the conclusion of some form of written agreement defining the general conditions under which individual assignment transactions might be effected. To the extent that such practices would be valid under variant B, the form requirement established in draft article 7 would preserve the level of flexibility needed as to the form of the assignment.

105. As to whether purely oral assignments should be invalid towards any party or, alternatively, vis-a-vis third parties only, it was generally felt that draft article 7 should result in a general prohibition of purely oral assignments. It was stated that such a general prohibition would be consistent with mandatory rules of law existing in certain countries. In addition, it was observed that such an approach was particularly needed in view of the decision of the Working Group to extend the scope of the draft Convention to cover international assignments of domestic receivables. Moreover, it was pointed out that distinguishing between parties to the assignment (i.e., the assignor and the assignee) and third parties (e.g., the debtor) in the context of a provision dealing with the form of the assignment was of no practical relevance and might result in an unnecessarily complex situation. After discussion, the Working Group decided that the words "towards third parties" should be deleted.

106. With respect to the second sentence of Variant B ("[If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.]"), the view was expressed that such a provision was needed to make it clear that, where a purely oral assignment was rendered effective by being subsequently put in writing, such an assignment would only become effective as of the time it had been put in writing. The prevailing view, however, was that the issues dealt with in the second sentence should be left to the law applicable outside the draft Convention. After discussion, the Working Group decided that the second sentence of variant B should be deleted.

Article 8. Time of transfer of receivables

107. The text of draft article 8 as considered by the Working Group was as follows:

"(1) A receivable arising up to the time of assignment is transferred at the time of assignment.

"(2) Without prejudice to the rights of the assignor's creditors, a future receivable is transferred directly to the assignee [when it is assigned] [when it arises] [when it becomes payable] [when it is earned by performance], without the need for a new assignment."

Paragraph (1)

108. The Working Group noted that paragraph (1) stated an obvious rule, which had been included in the text for reasons of completeness, and adopted it unchanged.

Definition of "future receivable"

109. Prior to discussing paragraph (2), the Working Group considered the definition of "future receivable", which had been reserved for future deliberation in the context of draft article 3 (see para. 83).

110. The concern was expressed that, in its present formulation, the definition of "future receivable" was too broad and covered the entire range of future receivables, including conditional and purely hypothetical receivables. In order to address that concern, the suggestion was made that the types of future receivables covered by the draft Convention should be somehow limited.

111. As to the precise way in which that result could be achieved, a number of proposals were made. One proposal was to introduce a time limit or a requirement for the identification of the debtor at the time of assignment. The latter requirement, it was observed, would resolve the problem of uncertainty as to the application of the draft Convention to an assignment of future receivables, since the identity of both the assignor and the debtor would be known at the time of assignment and, as a result, the internationality of a future receivable could be determined at that time under draft article 1(2) (see paras. 29-30).

112. Another proposal was that the scope of future receivables covered by the draft Convention should be limited to those that, at the time when they arose, could be identified as assigned receivables. As a result, the definition of "future receivable" should be revised to read along the following lines: "Future receivable means a receivable that might arise after the conclusion of the assignment, provided that at the time it arises it can be identified as a receivable to which the

assignment relates". While broad support was expressed in favour of the principle that future receivables should be identified as receivables to which the assignment related, the suggestion was objected to on the grounds that: identification of future receivables should be a condition of the validity of their transfer and not an element in their definition; and that the time at which the future receivables should be identified as receivables to which the assignment related should be the time of the assignment and not the time at which the receivables arose. The identification of the receivables at the time of the assignment, it was observed, might be useful for evidentiary purposes and would be consistent with current practice.

113. In the discussion, the view was expressed that, while article 8 dealt with the question of time of transfer of receivables and the question whether the original "master" assignment was sufficient, there was no provision in the text of the draft Convention dealing with the more fundamental question of the validity of the assignment of future receivables. It was, therefore, suggested that a provision should be included in the text providing for the validity of the assignment of future receivables. In support of that suggestion, it was pointed out that significant financing practices were faced with the uncertainty prevailing in many legal systems with regard to the validity of the assignment of future receivables. The availability of credit on the basis of receivables, it was said, could be increased if the principle of the validity of the assignment of future receivables were to be enshrined in the draft Convention.

114. After discussion, the Working Group decided to retain the definition of "future receivable" unchanged and requested the Secretariat to prepare a provision dealing with the validity of the transfer of future receivables, taking into account the views expressed.

Paragraph (2)

"Without prejudice to the rights of the assignor's creditors"

115. It was noted that the opening words of paragraph (2) had been inserted pursuant to a decision taken by the Working Group at its previous session that, while the transfer should be effective against all parties, the rights of third parties should not be affected (A/CN.9/432, para. 111). The Working Group decided that the opening words of paragraph (2) should be retained.

"directly"

116. It was noted that the term "directly" was intended to address the question whether the future receivables were acquired by the assignee directly, an important question in case the assignor became insolvent after the assignment but before the receivables arose. The view was widely shared that, should the Working Group decide to set the time of transfer of future receivables at the time of their assignment, that question would not arise and the term "directly" would be unnecessary.

[when it is assigned] [when it arises] [when it becomes payable] [when it is earned by performance]

117. It was recalled that, at its current session, the Working Group had decided that contractual receivables should be deemed to arise at the time of the conclusion of the original contract (see para. 80). In view of that decision, it was noted, the second alternative ("when it arises") would result in the future receivable being transferred at the time when the original contract would be concluded (which, as a result of the definition of future receivables, would be after the assignment).

118. Differing views were expressed as to the time at which a future contractual receivable that was assigned should be deemed to be transferred. One view was that future contractual receivables could be transferred only when they came into existence in the sense that they became payable. In support of that view, it was observed that a non-existing asset could not be transferred. Another view was that future contractual receivables should be deemed to be transferred at the time of the original contract. It was pointed out that such an approach would not compromise the rights of the assignee, since in practice credit was extended at the time when an actual transaction from which receivables might flow was concluded.

119. The prevailing view, however, was that future contractual receivables should be deemed to be transferred at the time of the assignment. It was stated that if the assignment did not have an immediate effect, uncertainty would prevail with regard to the relative rights of the assignee and other parties (e.g., other assignees or creditors of the assignor). Thus, the ability of the assignor to raise credit on the basis of its future receivables would be seriously compromised. As to the fact that future receivables were "non-existing" assets, it was pointed out that that characteristic did not reduce their importance as a source of low-cost credit. Reference was made to currently existing financing practices involving domestic assignments or domestic receivables and to the potential that setting the time of transfer of future receivables at the time of assignment would increase the value of future receivables as a source of credit and provide access to new and increased sources of credit in international markets.

120. In the discussion, the view was expressed that the transfer of future tort receivables should be deemed as occurring at a different time, e.g., when a future tort receivable became payable. For lack of sufficient time, the Working Group referred that question to a future session.

121. After discussion, the Working Group decided that paragraph (2) should be redrafted so as to indicate that future contractual receivables were deemed to be transferred at the time when the assignment was effected.

"without the need for a new assignment"

122. In view of the decision of the Working Group on the time of transfer of future contractual receivables, the view was expressed that the reference to a need for a new assignment was redundant and should be deleted. It was pointed out, however, that such a reference was useful in that it addressed the problem whether a new formality had to be met each time a future receivable arose, or whether the original "master" assignment was sufficient. After discussion, the Working Group requested the Secretariat to revise the final words of paragraph (2) in order to reflect the understanding of the Working Group that a future contractual receivable arose at the time of assignment without the need to have a new assignment document covering that receivable.

General remarks

123. At the close of the discussion, the view was expressed that, for draft article 8 to apply to an assignment relationship, it would be sufficient if the assignor were in a contracting State. A requirement that the assignee or the debtor be in a contracting State would unnecessarily limit the application of that article and could deprive those parties from access to lower-cost credit. In addition, such a requirement would create difficulties to significant financing transactions that involved a multiplicity of assignees or debtors (e.g., syndicated loans and bulk assignments), not all of whom might be in contracting States.

Article 9. Bulk assignments

124. The text of draft article 9 as considered by the Working Group was as follows:

"Without prejudice to the rights of the assignor's creditors, future receivables that are not specified individually are transferred, if they can be identified as receivables to which the assignment relates either at the time agreed upon by the assignor and the assignee or, in the absence of such agreement, when the receivables arise."

125. The Working Group found the substance of draft article 9 to be generally acceptable. It was widely felt that the draft Convention should apply to bulk assignments and to assignments of single receivables and that it should, in all instances, apply equally to existing and to future receivables. In order to expedite the lending process and to reduce the cost of the transaction to the lender which would be passed on to the assignor, it was stated, a legal framework had to be created, which would reduce the documentation needed to support a loan based on a pool of receivables. If the draft Convention did not adopt the language set forth in draft article 9 and if new documents were required to be executed by the assignor each time a new receivable covered by the draft Convention came into existence, costs of administering a lending programme would increase considerably and the time needed to obtain properly executed assignment documents and to review the documents would slow down the lending process to the detriment of the assignor.

126. As to the precise formulation of draft article 9, it was suggested that an additional provision might be included with a view to expressly establishing the validity of bulk assignments, an issue that might not be readily solved under all legal systems. Another suggestion was that the reference to "future" receivables should be deleted in view of the general nature of the principle underlying draft article 9, which should not suggest that future and existing receivables should be treated differently with respect to the validity of bulk assignments. Yet another suggestion was that the words "either at the time agreed upon by the assignor and the assignee or, in the absence of such agreement, when the receivables arise" were unnecessary, in view of the decision made in the context of draft article 8 as to the time of transfer of contractual receivables, which would apply equally to individual assignments and to bulk assignments. A further suggestion was that the words "are transferred" should be replaced by the words "are assigned", for consistency with the formulation used in draft article 8. After discussion, the Working Group adopted the substance of draft article 9 and requested the Secretariat to prepare a revised draft reflecting the above suggestions.

General remark

127. At the close of the discussion of draft article 9, the view was expressed that, for draft article 9 to apply, only the assignor needed to be in a contracting State. Requiring that all assignees or debtors involved in such assignments be in contracting States would severely limit the scope of application of the draft Convention.

Article 10. Agreements prohibiting assignment

128. The text of draft article 10 as considered by the Working Group was as follows:

"(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting assignment.

"(2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement prohibiting assignment, but the assignee is not liable to the debtor for such a breach."

Paragraph (1)

129. It was recalled that draft article 10 was intended to cover contractual but not statutory prohibitions of assignment. Draft article 10 was aimed at providing certainty as to the validity of an assignment made in breach of a no-assignment clause, while ensuring that the debtor might recover from the assignor any damage suffered as a result of the assignment. However, that remedy would not be available against the assignee, since otherwise the assignment could be deprived of any value. The Working Group felt that the validity of assignments made in violation of no-assignment clauses was generally acceptable, despite the fact that, under some national laws, such assignments were considered as being invalid, while, under other national laws, no-assignment clauses were held to be invalid. It was stated that such an approach would facilitate receivables financing since no-assignment clauses created uncertainty as to the validity of the assignment, thus increasing the cost of credit.

130. The view was expressed that the reference to no-assignment clauses in paragraph (1) might need to be broadened to cover not only cases where a contractual clause prohibited the assignment of a receivable, but also cases where such a clause limited in any way the assignability of that receivable. It was thus suggested that the words "prohibiting assignment" should be replaced by the words "limiting the assignment in any way". Subject to that change, the Working Group adopted paragraph (1).

Paragraph (2)

131. As to the liability of the assignee towards the debtor for violation of an anti-assignment clause agreed upon between the assignor and the debtor, which was excluded by the words "but the assignee is not liable to the debtor for such a breach", differing views were expressed. One view was that releasing the assignee from liability towards the debtor might result in the debtor having to pay the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed out that such an approach would be inconsistent with the approach taken in a number of national legal systems, particularly in situations where the assignee had acted with negligence or in bad faith.

132. The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause to the assignee would result in reduced availability of lower-cost credit, since assignees would have to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. In addition, it was stated that paragraph (2), to the extent it did not deprive the debtor of its remedies against the assignor, did not change the legal position of the debtor, and was thus consistent with the principle of debtor protection embodied in draft article 4, as well as in other provisions of the draft Convention (e.g., draft article 16).

133. A proposal was made that additional wording should be included in draft article 10 to the effect that no-assignment clauses would be invalid under the draft Convention or, at least, that the debtor would not be allowed to invoke the breach of a no-assignment clause as a legal ground for terminating the original contract. It was stated that validating no-assignment clauses would result in

increasing the cost of credit, particularly in the context of bulk assignments, since assignees might need to review large numbers of contracts to ensure that they did not contain no-assignment clauses. Although some support was expressed in favour of that proposal, the prevailing view was that the draft Convention should not interfere with the relationship between the debtor and the assignor and with the law applicable outside the draft Convention regarding the validity of no-assignment clauses. In addition, it was widely felt that the proposed wording would reduce the acceptability of the draft Convention and raise difficulties, e.g., as to whether the breach of a no-assignment clause should be regarded as a fundamental breach of contract. After discussion, the Working Group adopted paragraph (2) unchanged.

General remarks

134. At the close of the discussion of draft article 10, it was recalled that the decision made by the Working Group to establish the right of the parties to the assignment to vary individual provisions of the draft Convention (see para. 41) should be limited to their mutual rights and obligations. Thus, the assignor and the assignee should not be allowed to disregard the principle stated in draft article 10, which should be regarded as mandatory. The view was also expressed that, for draft article 10 to apply, the debtor needed to be in a contracting State.

Non-contractual prohibitions of assignment

135. A question was raised as to whether provisions similar to those contained in draft article 10 should be included in the draft Convention to deal with non-contractual prohibitions of assignment. The view was expressed that the draft Convention should also validate assignments made in violation of non-contractual prohibitions of assignment, e.g., in situations where the assignment was prohibited by law. It was stated that, where a contracting State chose to ratify the draft Convention, that State should be presumed to adhere to the basic aims of the draft Convention with respect to increasing the availability of lower-cost credit.

136. The prevailing view, however, was that it would be inappropriate for the draft Convention to attempt overruling existing rules of national law, which were often regarded as mandatory, particularly with respect to the non-assignability of certain types of non-contractual receivables. It was generally felt that such an attempt might adversely affect the acceptability of the draft Convention. After discussion, the Working Group decided that non-contractual prohibitions of assignment should not be addressed in the draft Convention.

Assignment of non-monetary receivables

137. In the context of the discussion of anti-assignment clauses, the Working Group reverted to the question discussed in the context of draft article 3(3) whether the draft Convention should cover only monetary receivables or also non-monetary receivables (see paras. 75-77). The view was expressed that establishing the validity of assignments made in breach of a no-assignment clause might raise particular difficulties with respect to certain types of non-monetary receivables. For example, where the original contract involved the licensing of intellectual property, that contract would normally contain a set of clauses designed to protect the confidentiality of the intellectual property and the protection of the trade secrets that might be involved. It was generally agreed that such contractual frameworks, aimed at prohibiting the assignment of intellectual property, should not be upset by the draft Convention. After discussion, the Working Group, decided that the assignment of such non-monetary receivables should be excluded from the scope of application of the draft Convention (see para. 77).

Article 11. Transfer of security rights

138. The text of draft article 11 as considered by the Working Group was as follows:

"(1) Unless otherwise provided by law or by agreement between the assignor and the assignee, any [personal or property] rights securing the assigned receivables are transferred to the assignee without a new act of transfer.

"(2) Paragraph (1) of this article does not affect any requirement relating to registration of any security rights."

139. It was noted that draft article 11 reflected the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision, which had been broadly supported at previous sessions of the Working Group (A/CN.9/420, para. 74 and A/CN.9/432, para. 130).

Paragraph (1)

140. The Working Group agreed that paragraph (1) should cover both personal (e.g., guarantees) and proprietary security rights (e.g., pledges, mortgages) and that any statutory prohibition of the transfer of those rights should be generally upheld. As to contractual prohibitions of the transfer of security rights, it was generally felt that they should be upheld, if agreed upon between the assignor and the assignee. It was observed that the approach taken in paragraph (1) allowing the assignor and the assignee to agree that those security rights would not be transferred with the assigned receivables was appropriate, since the assignee might not wish to accept the duties that might relate to those security rights (e.g., maintenance, taxation and insurance of mortgaged real estate).

141. With regard to contractual prohibitions of the transfer of security rights, agreed upon between the assignor and the debtor, differing views were expressed. One view was that such contractual prohibitions should be upheld in order to preserve party autonomy. The prevailing view, however, was that such contractual prohibitions should be treated in the same way as contractual prohibitions of assignment of receivables. The example was given of securitization in which the receivables were assigned from the original creditor to a special purpose corporation, whose only assets were the assigned receivables. In such cases, it was pointed out, the value was not in the receivable but rather in the guarantee given by the owner of the special purpose corporation. It was observed that, if the debtor were to be allowed to exclude the transferability of that guarantee, it would in effect defeat the value of receivables as a basis for financing, a result that would run counter to the policy underlying draft article 10.

142. While treating contractual prohibitions of transfers of security rights along the lines of draft article 10 was found to be acceptable in principle, a number of concerns were raised as to the impact of such an approach on certain third parties.

143. One concern was that such an approach would inadvertently result in imposing on a guarantor an obligation to pay the assignee, instead of the assignor towards whom the guarantor had undertaken an obligation to pay in the first place. It was stated that such an approach would restrict the autonomy of the parties to the guarantee relationship and thus interfere with established practices. However, it was suggested that a distinction should be drawn between accessory and independent guarantees. While guarantees stipulated as accessory would normally be transferred automatically with the principal obligation (i.e., the assigned receivable), independent guarantees (or stand-by

letters of credit) would be stipulated as not related to the receivable or the assignment-relationship and should not be transferred automatically to the assignee.

144. It was generally felt that the independence of the undertaking of the guarantor/issuer, as described in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, should not be compromised. In addition, it was agreed that that result could be achieved, without restricting the transferability of guarantees as between the assignor and the assignee. In practical terms, it was pointed out, the guarantor/issuer should be able to pay the assignor, while the assignee would have a right to claim the proceeds of that payment. It was pointed out that the Working Group might need to consider the consequences resulting from such a rule in the context of insolvency of the assignor.

145. Another concern was that allowing the automatic transfer of proprietary rights securing the assigned receivables might be inappropriate in case those rights entailed possession of the asset encumbered (e.g., pledge). The example was given of an international assignment of domestic receivables, in which the assets encumbered could be transferred to a foreign country, a result that was said to be particularly undesirable.

146. After discussion, the Working Group decided that agreements between the assignor and the debtor restricting the transferability of rights, personal or proprietary, securing the assigned receivables should be treated along the lines of draft article 10. In addition, the Working Group decided that the transferability of those security rights as between the assignor and the assignee should not prejudice the rights of the guarantor/issuer of an independent undertaking or the owner of an asset which was subject to a possessory security right. On that understanding, the Working Group adopted the substance of paragraph (1) and requested the Secretariat to introduce wording at the appropriate place in the text of the draft Convention, reflecting that understanding.

Paragraph (2)

147. While paragraph (2) was found to be generally acceptable, the suggestion was made that its scope should be expanded so as to cover, in addition to registration, form requirements. It was observed that the question whether the form required for the transfer of a security right should have an impact on the form of the assignment itself might also need to be addressed, either in the context of paragraph (2) or of draft article 7. After discussion, the Working Group adopted the substance of paragraph (2) and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

CHAPTER III. RIGHTS, OBLIGATIONS AND DEFENCES

Article 12. Rights and obligations of the assignor and the assignee

148. The text of draft article 12 as considered by the Working Group was as follows:

> "[(1) [Subject to the provisions of this Convention,] the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages referred to therein.]

"(2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

"(3) The assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to receivables financing practice."

Paragraph (1)

149. It was noted that under paragraph (1), in case of conflict between the draft Convention and the agreement between the assignor and the assignee, the draft Convention would prevail. It was also noted that such an approach would not restrict the autonomy of the assignor and the assignee, since, with the exception of the provisions dealing with the form of the assignment, the provisions of the draft Convention dealing with the rights of the assignor and the assignee (draft articles 11, 12(2) and (3), 13 and 14(1)) could be varied by agreement. The view was expressed that the reference to usages in paragraph (1) was unnecessary and should be deleted, since usages were covered in paragraphs (2) and (3). Subject to that change, the Working Group adopted paragraph (1).

Paragraph (2)

150. It was noted that, under paragraph (2), which was modelled on article 9(1) of the United Nations Sales Convention, general trade usages were subject to the agreement of the parties, while practices established by the parties between themselves were binding unless modified. The view was expressed that the modification introduced in paragraph (2) to the rule in article 9 of the United Nations Sales Convention (i.e., "unless otherwise agreed") was justified. It was explained that, as opposed to the hierarchy of legal rules established in the United Nations Sales Convention where the agreement prevailed over the Convention (article 6), the draft Convention prevailed over the agreement (draft article 12(1)). On the other hand, the view was expressed that the modification was unnecessary, since draft article 12(1) was not mandatory. While agreeing that that question might need to be reconsidered at a future session, the Working Group adopted paragraph (2) unchanged.

Paragraph (3)

151. Paragraph (3), which was modelled on article 9(2) of the United Nations Sales Convention, was found to be generally acceptable in principle. However, a number of concerns were expressed as to its exact formulation. One concern was that the reference to "receivables financing practice" in general could inadvertently result in the application of, for instance, factoring usages to a securitization transaction. In order to avoid that result, the suggestion was made that reference should be made to the "relevant" receivables financing practice. Another concern was that, in its current formulation, paragraph (3) might have the unintended effect of subjecting the domestic assignment of international receivables to international usages. The view was expressed that that concern might be addressed by the requirement contained in paragraph (3) that only international usages that the parties knew or ought to have known would be applicable. The prevailing view, however, was that even if international usages were known to the parties to a domestic assignment, they should not apply to that assignment. The suggestion was thus made that the scope of paragraph (3) should be limited to international assignments. After discussion, the Working Group adopted the substance of paragraph (3) and requested the Secretariat to prepare a revised draft reflecting the suggestions made.

Article 13. Representations of the assignor

152. The text of draft article 13 as considered by the Working Group was as follows:

"(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor[, and that the debtor does not have, at the time of assignment, defences or set-offs that could [deprive the assigned receivables of value] [defeat, in whole or in part, the right of the assignee to request payment]].

"(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor will pay."

Paragraph (1)

153. There was broad agreement in the Working Group as to the general policy underlying draft article 13 that, at the time when the assignee decided to buy a receivable or to grant credit based on that receivable, it was of importance for the assignee to be provided with adequate means to assess the value of that receivable. The view was expressed that that policy might need to be expressed more clearly in paragraph (1) by listing the various elements that would allow the assignee to price a given receivable. For that purpose, it was suggested that the assignee needed representations by the assignor that, at the time of the assignment: the assignor owned the receivable; the assignor had a right to transfer the receivable; the assignor had not previously assigned the receivable to another assignee; and the debtor had no defences to payment and no right of set-off other than those specified in the assignment. In favour of listing the suggested representations in the text of paragraph (1), it was stated that, unless such representations were expressly covered, the assignee might bear the cost of making determinations with respect to some or all of the above-listed elements, which would increase the overall cost of credit. Doubts were expressed, however, as to the suggested method of listing various elements in an exhaustive list. It was suggested that the matter might more appropriately be dealt with by way of a more general, open-ended wording (e.g., a general reference to the "existence" of the receivable), which would also encompass the various items on the suggested list.

154. After discussion, the Working Group, while noting that some of the above-listed elements were already covered in draft article 13, was agreed that paragraph (1) should contain a list along the suggested lines. A proposal was made that the representation as to the absence of a previous assignment should be complemented by a representation as to the absence of future assignments. While support was expressed in favour of the proposal, it was pointed out that such an additional representation was not usually encountered in practice, except in the context of "subordination agreements", i.e., agreements concluded between several assignees to settle conflicts of priorities. It was also stated that the draft Convention might need to accommodate exceptional situations where dual assignments were conceivable. The Working Group agreed that the issue might need to be further discussed at a future session and decided that the proposed wording should be mentioned between square brackets in a revised draft to be prepared by the Secretariat.

155. The Working Group next discussed the nature of the representations of the assignor. In particular, a question was raised as to the sanctions that might be applicable in case of a breach of the assignor's representations. It was generally felt that the consequences of such a breach of representation had to be considered in the context of the underlying financing contract between the assignor and the assignee, which should not be touched upon by the draft Convention. Moreover, it

was felt that it might be difficult to reach a common understanding as to the extent of liability or the measure of damages in the context of such a breach of representation. After discussion, the Working Group decided that draft article 13 should contain no general provision dealing with the issues of breach of representation.

156. As to whether the defences or rights of set-off covered in paragraph (1) should be qualified as "defences that could deprive the assigned receivables of value" or "defences that could defeat, in whole or in part, the right of the assignee to request payment", various views were expressed. One view was that the mere reference to "defences" might be too broad and result in uncertainties as to the scope of draft article 13. For example, it was stated that it might be unclear whether a delayed payment might be regarded as a "defence" under draft article 13. With a view to clarifying that the reference to "defences" in draft article 13 was not intended to cover the situation where payment was merely delayed, it was suggested that the wording "defences that could defeat, in whole or in part, the right of the assignee to request payment" should be adopted. That suggestion was objected to on the grounds that, for the purpose of pricing receivables, the time of payment might be as critical as the ability to obtain payment.

157. Another view was that the reference to "defences" might need to be qualified to make it clear that, under draft article 13, the assignor should not be understood as representing that the original contract did not contain anti-assignment clauses. In support, it was stated that, in practice, the assignee would or should often know of the existence of anti-assignment clauses in the original contract. In such cases, draft article 13 might lead to the unintended result that the assignee might, for example, be entitled to claim damages from the assignor or to terminate the financing contract, based on breach of the assignor's representation as to the absence of an anti-assignment clause, which, in fact, was or should have been known to the assignee. In that context, it was proposed that paragraph (1) should only deal with defences or rights of set-off "unknown to the assignee".

158. The Working Group generally agreed that paragraph (1) was not intended to create a specific duty for the assignor to represent that the original contract did not contain an anti-assignment clause. In substance, the issue of anti-assignment clauses was dealt with in draft articles 10(2) in the context of the contractual relationship between the debtor and the assignor, and in draft article 17(3) in the context of the relationship between the assignee and the debtor. Both articles established that the liability for breach of an anti-assignment clause rested with the assignor. However, where the original contract contained an anti-assignment clause, a breach of that clause would not defeat the assignee's right to obtain payment, since payment to the assignee would be due by the debtor under draft article 17(3), in spite of the anti-assignment clause. While the Working Group generally felt that the unintended interpretation of paragraph (1) with respect to anti-assignment clauses was implicitly excluded by the provisions of draft articles 10(2) and 17(3), it was agreed that more explicit wording might need to be introduced in paragraph (1).

159. As to the qualification of defences or rights of set-off under paragraph (1), support was expressed in favour of retaining the words "defeat, in whole or in part, the right of the assignee to request payment". The prevailing view, however, was that the representations of the assignor should be understood in the broadest possible meaning. With respect to the proposal that paragraph (1) should refer only to defences or set-offs "unknown to the assignee", it was widely felt that, for practical reasons, the application of draft article 13 should not be based on a determination of the actual or constructive knowledge of the assignee, which might give rise to uncertainties. After discussion, the Working Group decided that the reference to "defences or set-offs" should not be qualified.

160. A question was raised as to the application of paragraph (1) to future receivables. The view was expressed that, where future receivables were involved, the provision might be overly burdensome for the assignor if the assignor had to represent that no defences or rights of set-off could be raised in the future against claims that did not exist at the time of the assignment. It was widely felt, however, that, as a default rule, the allocation of risks for unknown defences of the debtor under paragraph (1) was reasonable, since it was within the control of the assignor to perform the original contract well and to avoid giving rise to defences of the debtor, and since, in any case, the assignor was in a better position to know whether the debtor had any defences. In that context, it was recalled that, at its previous session of the Working Group, it had been stated that the approach taken in paragraph (1) was particularly useful, for example, in the context of contracts for the sale of goods in which service and maintenance elements were to be included. It was pointed out that, if the seller-assignor left the goods to deteriorate, that conduct would give rise to defences on the part of the debtor, and the assignee would not be able to do anything to prevent that result (A/CN.9/432, para. 150).

Paragraph (2)

161. The Working Group found the substance of paragraph (2) to be generally acceptable. As a matter of drafting, the view was expressed that the words "the debtor will pay" might be misread as focusing on the validity of the instrument under which the assigned receivable arose. It was suggested that paragraph (2) should indicate more clearly that its focus was on the solvency of the debtor, which was the main element in assessing the credit risk linked to the assignment. It was thus proposed that the words "the debtor will pay" should be replaced by the words "the debtor has the financial ability to pay". After discussion, the Working Group adopted paragraph (2) with the proposed wording.

Article 14. Assignee's right to notify the debtor and to request payment

162. The text of draft article 14 as considered by the Working Group was as follows:

> "(1) Unless otherwise agreed between the assignor and the assignee, the assignee is entitled to give to the debtor notification of the assignment and to request payment of the receivables assigned.
>
> "(2) If the assignee gives notification of the assignment to the debtor in violation of an agreement between the assignor and the assignee prohibiting or restricting notification, the notification is effective but the assignee may be liable to the assignor for breach of contract."

Paragraph (1)

163. The Working Group found the substance of paragraph (1) to be generally acceptable. A question was raised as to whether the assignee should simply be "entitled" to notify the debtor of the assignment and to request payment or whether the provision contained in paragraph (1) should be expressed in the form of an obligation to notify. It was stated that establishing an obligation to notify the debtor of the assignment might help to clarify the rights and obligations of the debtor. It was widely felt, however, that, while the rights and obligations of the debtor might need to be specified (e.g., in draft articles 4 and 16) in situations where the assignor or the assignee had chosen to notify the debtor of the assignment, the draft Convention should not create an obligation, or even be read as

encouraging the assignee, to notify the debtor of the assignment. It was widely felt that the draft Convention should not interfere with the legitimate interest which the assignor might have in not disclosing the assignment, except to the extent necessary to preserve the right of the assignee to obtain payment from the debtor. It was recalled that, in many practical situations, either the debtor would not be notified of the assignment, and the assignor would receive payment on behalf of the assignee, or notification of the assignment would be impossible, e.g., in cases of bulk assignments of future receivables.

164. A number of suggestions of a drafting nature were made, including: that the general rule contained in draft article 15 (1)(a) might need to be expressed before draft article 14 or to be inserted in paragraph (1); and that the words "at the time they become payable" might need to be added at the end of paragraph (1). After discussion, the Working Group adopted the substance of paragraph (1). The Secretariat was requested to consider, in the preparation of a revised text of the draft Convention, the possible placement of paragraph (1) after article 15, or a possible combination of the provisions of article 15(1) and paragraph (1).

Paragraph (2)

165. The Working Group found paragraph (2) to be generally acceptable. As to its exact formulation, it was pointed out that, while both the title of draft article 14 and the text of paragraph (1) referred at the same time to the right to notify the debtor of the assignment and to the right to request payment, paragraph (2) only referred to the right to notify. It was generally agreed that paragraph (2) should not be misinterpreted as limiting the right of the assignee to request payment from the debtor in cases where notification of the assignment had been made in violation of a contractual agreement between the assignor and the assignee. Subject to that change, the Working Group adopted paragraph (2).

Article 15. Notification of the debtor

166. The text of draft article 15 as considered by the Working Group was as follows:

"(1) Notification of the assignment shall:

"(a) be given in writing to the debtor by the assignor or by the assignee; and

"(b) reasonably identify the receivables assigned and the person to whom or for whose account the debtor is required to make payment.

"(2) Notification of the assignment may relate to receivables arising after notification."

Definition of "notification"

167. Prior to discussing the text of draft article 15, the Working Group considered the definition of "notification of an assignment" (draft article 3(7)), which had been reserved for future deliberation (see para. 85). The Working Group agreed that draft article 3(7), under which notification of the assignment meant "a statement informing the debtor that an assignment has taken place", was an essential element of the legal regime of notifications under the draft Convention. As a matter of drafting, the view was expressed that the provisions of draft articles 3(7) and 15 might need to be

combined in a single provision. The prevailing view, however, was that the legal regime of notifications was appropriately split between the short definition contained in draft article 3(7) and the more detailed rules stated in draft article 15. After discussion, the Working Group adopted draft article 3(7) unchanged.

Paragraph (1)

Opening words and subparagraph (a)

168. The Working Group found the substance of the opening words and subparagraph (a) to be generally acceptable.

Subparagraph (b)

169. While the substance of subparagraph (b) was found to be generally acceptable, a number of suggestions were made as to its exact formulation. One suggestion was that wording should be added to the text of subparagraph (b) to the effect that the assignor or the assignee, when notifying the debtor of the assignment, should be under a general obligation to furnish the debtor with adequate proof that the assignment had been made. It was stated that, while draft article 16(7) merely placed the assignee under such an obligation "if requested by the debtor", the production of adequate proof that the assignment had taken place should be made a general condition of effectiveness of the notification. The suggested wording, it was said, would enhance certainty in the assignment process. The widely prevailing view, however, was that establishing such a general condition of effectiveness would make the assignment process excessively cumbersome.

170. Another suggestion was that the reference to "the person to whom" the debtor was required to make payment might need to be complemented by a reference to "the address" at which the debtor might be required to make payment under the notification. It was generally felt that such an amendment was needed in view of the increased frequency of instructions to pay, for example into bank accounts or post office boxes rather than to an identified person.

171. As to the change in the payment instructions by way of the notification of the assignment, several concerns were expressed. One concern was that the text of subparagraph (b) might need to be redrafted to make it clear that, while recognizing the effectiveness of the payment instructions contained in the notification, the draft provision should not interfere with certain legal characteristics of the payment obligation that might stem from the original contract and vary the rules applicable to that contract outside the draft Convention, as to whether payment was due at the address of the payee or whether it should be collected by the payee. Another concern was that recognizing the effectiveness of the payment instruction contained in the notification should not result in adversely affecting the situation of the debtor. With a view to limiting the possibly adverse effects that a change in the payment instructions might entail for the debtor, it was suggested that wording should be inserted in the text of subparagraph (b) to the effect that the person to whom, or the address at which, the debtor could be required to pay under the notification should be located in the same country as the debtor or the assignor. After discussion, the Working Group approved the substance of subparagraph (b) and requested the Secretariat to introduce wording in the text of subparagraph (b) or in draft article 4 to address the concerns expressed.

Paragraph (2)

172. Broad support was expressed in favour of the policy reflected in paragraph (2) that notification could relate to future receivables. As to the question whether the validity of the notification of an assignment of future receivables should be limited in time, differing views were expressed.

173. One view was that no time limit was acceptable for the validity of the notification under the draft Convention. It was stated that possible restrictions as to the validity of a notification should be dealt with in the context of the underlying financing contract between the assignor and the assignee, and should not be touched upon by the draft Convention. It was stated that, in cases of long-term contracts, the renewal of a notification at the expiry of a fixed period of time might be overly burdensome, in particular where bulk assignments were involved. It was also stated that an obligation to renew the notification might be disruptive of commercial practices based on long-term relationships in that it would introduce an element of uncertainty as to whether the notification had been renewed, properly or at all. It was pointed out that any limitation to either the validity of assignments of future receivables or the validity of the notification of assignments of such receivables would adversely affect the economic autonomy of potential assignors.

174. In favour of limiting in time the validity of notifications of assignments, it was stated that such a limitation would be consistent with the law applicable in a number of countries. The view was widely shared that some form of limitation of the validity of a notification of assignment of future receivables might be acceptable. However, a note of caution was struck as to the risk that limiting the validity of notifications to a short period of time might result in an excessive disruption of existing market practices with respect to future receivables. In the same vein, it was stated that possible limitations on the validity of notifications should not be inconsistent with the definition of "future receivables" under the draft Convention. In particular, if "future receivables" as defined under the draft Convention were not limited in time, it might be inappropriate to defeat the effect of such a definition by restricting the validity of the notification. It was suggested that limiting the effectiveness of notifications to a period of five years might be sufficiently protective of market practices, provided that such a period was renewable.

175. It was thus suggested that paragraph (2) might be redrafted to include additional language specifying that the validity of a notification of assignment of future receivables would be limited to a period of five years, subject to a renewal of the notification within the five-year period. Such additional language might be placed between square brackets for consideration by the Working Group at a future session. While strong support was expressed in favour of that suggestion, the Working Group felt that that matter needed to be further considered at a future session.

Article 16. Debtor's discharge

176. The text of draft article 16 as considered by the Working Group was as follows:

> "(1) Until the debtor receives notification of the assignment pursuant to article 15, it is entitled to discharge its obligation by paying the assignor.
>
> "(2) After the debtor receives notification of the assignment pursuant to article 15, subject to paragraph (3), it is entitled to discharge its obligation by paying the assignee.

"(3) Notwithstanding notification of the assignment pursuant to article 15, the debtor shall discharge its obligation by paying the assignor, if:

"[(a) the debtor has actual knowledge of the invalidity of the assignment; and

"(b)]the debtor is instructed in the notification to continue paying the assignor.

"(4) Notwithstanding notification of the assignment pursuant to article 15, if the debtor receives notification of a prior assignment pursuant to article 15, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor, it is entitled to [discharge its obligation by depositing the amount owed with a public deposit fund] [seek instructions from a competent judicial or non-judicial body and pay as instructed].

"(5) In case the debtor receives notification pursuant to article 15 of more than one assignment of the same receivables made by the same assignor, the debtor is entitled to discharge its obligation by paying the first assignee to give notification of the assignment pursuant to article 15 and has against that assignee the defences and set-offs provided for under article 17

"(6) If so agreed between the assignor and the debtor before notification of the assignment pursuant to article 15, the debtor is entitled to discharge its obligation by paying into a bank account or a post office box specified in the agreement. After notification of the assignment pursuant to article 15, the debtor and the assignee may agree on the method of payment.

"(7) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is entitled to pay the assignor and be discharged from liability [deposit the amount owed with a public deposit fund] [seek instructions from the competent judicial or non-judicial body and pay as instructed]. Adequate proof includes, but is not limited to, any document emanating from the assignor and indicating that the assignment has taken place.

"(8) Paragraph (2) of this article does not prejudice any other ground on which payment by the debtor to the assignee discharges the debtor's obligation."

Paragraph (1)

177. The Working Group agreed with the rule established in paragraph (1), namely that, up to the notification of the assignment, the debtor had a right to discharge its obligation by paying the assignee, and adopted paragraph (1) unchanged.

Paragraph (2)

178. It was noted that paragraph (2) was cast as entitling, and not obliging, the debtor to pay the assignee after notification, since the obligation to pay was stemming from the original contract and not from the notification itself.

179. While the Working Group agreed with the general policy underlying paragraph (2), it was generally felt that, in its current formulation, paragraph (2) might lead to the unintended result that

the debtor, after notification, would have the discretion to discharge its obligation by paying the assignor or the assignee, a result that might create uncertainty as to the rights of the assignee. The suggestion was thus made that paragraph (2) needed to be reformulated to provide that, after notification, the debtor was obliged, subject to the original contract, if any, to discharge its obligation by paying the assignee. In addition, in order to align paragraph (2) with current practices, it was suggested that reference should be made, in addition to payment to the assignee, to payment being made pursuant to the instructions contained in the notification, an idea that was already reflected in subparagraph (b) of paragraph (3). Subject to the changes suggested, the Working Group adopted paragraph (2).

Paragraph (3)

Subparagraph (a)

180. The Working Group decided to delete subparagraph (a). It was generally felt that introducing a subjective criterion, i.e., knowledge of the assignment by the debtor, in the substance of a rule dealing with the debtor's discharge of its obligations would undermine the twin goals of such a rule, namely debtor protection and legal certainty in the context of the assignment. In addition, the view was widely shared that subjecting the debtor's discharge to its knowledge of the validity of the assignment would place on the debtor the burden of having to establish the validity of the assignment, not only as a matter of fact but also as a matter of law, a burden that was said to be too onerous for the debtor to bear. Moreover, it was observed that a rule along the lines of subparagraph (a) could lead to unintended results. For example, if the debtor were diligent and discovered the invalidity of the assignment, the assignment would be defeated; and, if the debtor did not sufficiently try to establish the invalidity of the assignment, it might be required to pay twice.

Subparagraph (b)

181. The Working Group decided that the principle stated in subparagraph (b) should be incorporated into paragraph (2). As a result of that decision and the decision to delete subparagraph (a), the Working Group decided that paragraph (3) as a whole should be deleted.

Paragraph (4)

182. The Working Group decided to delete paragraph (4). It was stated that paragraph (4) was either superfluous, in that it repeated a rule already existing under national law governing attachment or insolvency issues, or unacceptable, in that it might run counter to fundamental considerations of national law. In addition, it was observed that paragraph (4) might raise uncertainty since it introduced too many different ways in which the debtor could discharge its obligation. Moreover, it was pointed out that paragraph (8) could be usefully expanded so as to cover all those situations in which the debtor could be discharged by paying the right person, or by paying into court or as instructed by a court. The suggestion was thus made that paragraph (8) should be reformulated along the following lines "This article does not prejudice any other ground on which payment by the debtor discharges the debtor's obligation". While that suggestion was broadly supported, it was stated that paragraph (8) did not cover other situations, e.g., knowledge of which was the right person for the debtor to pay or the situation in which the assignor might withdraw the notification. As to the knowledge of the validity of the assignment, it was pointed out in response that the issue of validity concerned the assignor and the assignee and not the discharge of the debtor's obligation.

Paragraph (5)

183. It was noted that paragraph (5) was intended to address the issue of multiple simultaneous assignments of the same receivables by the assignor, while the issue of subsequent assignments was dealt with in draft article 25(4). In addition, it was noted that paragraph (5) was not intended to address the question of priority among several parties laying a claim on the assigned receivables, a question addressed in draft articles 21 to 24. While broad support was expressed in favour of paragraph (5), it was suggested, as a matter of drafting, that priority should be given to the assignee mentioned in the first notification, irrespective of whether notification was given by the assignee itself or by the assignor. Subject to that change, the Working Group approved the substance of paragraph (5).

Paragraph (6)

184. The Working Group decided to delete paragraph (6). As to the first sentence, a number of objections were raised, including: that it was superfluous in that it stated the obvious rule that the parties to the original contract could agree on the method of payment; and that it might be restrictive in that it referred to only two methods of payment, thereby excluding, for example, payment through the use of electronic data interchange.

185. The second sentence was also objected to on a number of grounds, including that: it was superfluous in that the assignee and the debtor could agree on a different method of payment in any case, if the change of the payment terms was agreeable to the debtor (e.g., payment in another currency available to the debtor); it was inappropriate in that it might inadvertently result in subjecting any change in the payment instructions made by the assignee to the consent of the debtor, an approach that would run counter to paragraph (2) as revised, and unduly interfere with current practices (see paras. 178-179); reference to a lock-box arrangement had already been included in draft article 15 (1)(b) by way of a reference to "the person" to whom or "the address" to which the debtor might pay (see paras. 169-171); and the concern about changes that might negatively affect the debtor's legal position (e.g., change in the country or the currency of payment) was already addressed in draft article 4 (see paras. 87-93).

Paragraph (7)

186. It was noted that paragraph (7) was predicated on the assumption that notification was given by the assignee and, as a result, the debtor should be entitled to some reassurance that an assignment had in fact taken place. Broad support was expressed in favour of the principle contained in paragraph (7) to the effect that, in the absence of "adequate proof" as to the status of the assignee, the debtor should be able to discharge its obligation by paying the assignor. It was pointed out that such an approach was consistent with current practice, in that a notification given by the assignee would contain an acknowledgement by the assignor, and, in the absence of such an acknowledgement, the debtor was entitled to request additional proof of the assignment. As to the options presented in paragraph (7) within square brackets, it was generally felt that they should be deleted for the same reasons the Working Group decided to delete those options in paragraph (4) (see para. 182).

187. With regard to the reference to "adequate proof" the concern was raised that it might not be readily understood in some legal systems and that it might, therefore, be replaced by a reference to "confirmation" by the assignor. In response, it was explained that the reference to "adequate proof", which was described in the last sentence of paragraph (7), was intended to introduce an objective test that would provide the certainty required for the protection of the debtor. The suggestion was made

that a copy of the assignment document should also be considered as being "adequate proof". That suggestion was broadly supported.

188. In response to a question raised as to whether registration of the assignment could also serve as "adequate proof", it was noted that: the working assumption of the Working Group had been that a registration system would be relevant in the context of the effects of the assignment on third parties; if registration related to the assignment-transaction as a whole, it would not operate efficiently and would raise difficult legal issues; and if "registration" were limited to the filing of a notice about the assignment by the assignee, it would not constitute "adequate proof" for the purpose of the debtor's protection.

189. After discussion, the Working Group adopted paragraph (7), subject to the deletion of the bracketed language and the expansion of the notion of "adequate proof" to cover a copy of the assignment document.

Paragraph (8)

190. While broad support was expressed in favour of the principle contained in paragraph (8), it was generally felt that its scope should be expanded so as to cover other situations in which the debtor might be discharged under national law (i.e., by paying not only the assignee, but the right person, or into court or to a public deposit fund).

191. As to the exact formulation of paragraph (8), the suggestion was made that paragraph (8) might be cast as a positive discharge rule along the following lines: "In addition to discharge of the debtor provided by paragraphs (1) through (7) of this article, the debtor is discharged to the extent of payment: (a) to the person entitled to payment; and (b) to a competent judicial [or non-judicial] body or a public deposit fund [to the extent that such payment discharges the debtor under national law]". It was noted that the Working Group had decided to formulate paragraph (8) in a negative way in order to avoid any reference to "other applicable law" and to align that provision with article 8(2) of the Factoring Convention. After discussion, the Working Group approved the substance of paragraph (8) and requested the Secretariat to prepare a revised draft, taking into account the above suggestions.

General remarks

192. The view was expressed that requiring the assignee to be in a contracting State for the application of draft article 16 would amount to an unnecessary and excessive limitation of its scope of application. In addition, such an approach would lend itself to abuse on the part of assignees who would wish to avoid the application of the fundamental principle of debtor protection enshrined in draft article 16.

193. In view of the tentative decision of the Working Group to cover the assignment of insurance policies (see para. 59) and the possibility that deposit accounts might be also covered (see para. 61), the concern was expressed that a rule along the lines of draft article 16 might interfere with well-functioning practices in which debtors were not required to pay any person other than their clients (e.g., banks, insurance companies, brokerage firms). It was pointed out that such practices did not need to be covered at all by the draft Convention, since they were functioning well. However, if they were to be covered, they should be excluded from draft article 16, since otherwise the acceptability of the draft Convention might be reduced.

Article 17. Defences and set-offs of the debtor

194. The text of draft article 17 as considered by the Working Group was as follows:

"(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences of which the debtor could avail itself if such claim were made by the assignor.

"(2) The debtor may raise against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose that were available to the debtor at the time notification of the assignment was given to the debtor.

"(3) Notwithstanding paragraphs (1) and (2), defences and set-offs that the debtor could raise against the assignor for breach of agreements prohibiting assignment pursuant to article 11 are not available to the debtor against the assignee."

Paragraph (1)

195. It was noted that paragraph (1) dealt with defences of the debtor arising from the original contract. Broad support was expressed in favour of paragraph (1), which reflected an essential principle for the debtor's protection, namely, that the debtor's legal position should not be negatively affected as a result of the assignment. It was generally agreed that paragraph (1) covered all defences, including: contractual claims which, in some legal systems, might not be considered "defences"; rights for contract avoidance, e.g., for mistake, fraud or duress; exemption from liability for non-performance, e.g., because of an unforeseen impediment beyond the control of the parties (see United Nations Sales Convention, art. 79); and rights arising from pre-contractual dealings. After discussion, the Working Group adopted paragraph (1) unchanged.

Paragraph (2)

196. It was noted that paragraph (2) was intended to address rights of set-off arising from separate dealings between the assignor and the debtor. In addition, it was noted that the right of set-off of the debtor against the assignee was limited to those rights available to the time of notification, in order to protect the assignee from the consequences of dealings between the assignor and the debtor, of which the assignee could have no knowledge. The Working Group adopted paragraph (2) unchanged.

Paragraph (3)

197. It was recalled that a representation, undertaken by the assignor pursuant to draft article 13, that the debtor did not have any defences did not amount to a representation that there was no anti-assignment clause in the original contract. It was explained that, even if such an anti-assignment clause were to be included in the original contract, the assignor would not be breaching its obligation to the assignee, since, pursuant to paragraph (3), the debtor could not raise defences or set-offs against the assignee for violation of an anti-assignment clause. In the discussion, the view was expressed that a representation by the assignor as to the absence of any defences on the part of the debtor would be inappropriate in the context of tort receivables and that therefore a different rule had to be prepared to address representations in assignments of tort receivables. After discussion, the Working Group adopted paragraph (3) unchanged.

Article 18. Modification of the original contract [and of the assignment]

198. The text of draft article 18 as considered by the Working Group was as follows:

"(1) A modification of the original contract agreed upon between the assignor and the debtor [before notification of the assignment] is binding on the assignee and the assignee acquires corresponding rights under the modified contract.

"[(2) A modification of the original contract, agreed upon between the assignor and the debtor after notification of the assignment, is binding on the assignee and the assignee acquires corresponding rights under the modified contract, if the modification is made in good faith and in accordance with reasonable commercial standards].

"[(3) A modification of the assignment, agreed upon by the assignor and the assignee after notification of the assignment pursuant to article 15, is binding on the debtor only if the debtor is given notification of the modified assignment]."

Paragraph (1)

199. Broad support was expressed in favour of the retention of paragraph (1) with the bracketed language. It was generally felt that allowing the assignor and the debtor to modify their contract before notification was consistent with the principle embodied in draft article 16, namely that before notification the debtor could discharge its obligation by paying the assignor. As a matter of drafting, it was suggested that paragraph (1) might need to be modified so as to avoid giving the mistaken impression that the assignment created a contractual relationship between the assignee and the debtor. Subject to that suggestion, the Working Group adopted paragraph (1).

Paragraph (2)

200. It was noted that, under paragraph (2), modifications of the original contract agreed upon by the assignor and the debtor after notification of the assignment were binding on the assignee only if they were made in good faith or in accordance with reasonable commercial standards.

201. Differing views were expressed as to the condition under which a modification of the original contract after notification of the assignment should bind the assignee. One view was that such modifications should be subject to the general or specific consent of the assignee. In support of such an approach, it was observed that after notification, the assignee became part of a triangular relationship and its interests should also be taken into account, alongside the interests of the debtor and the assignor. In addition, it was pointed out that use of the terms "good faith" or "reasonable commercial standards" might introduce uncertainty since they were not universally understood in the same manner.

202. Another view was that modifications after notification should be binding on the assignee only if they were made in good faith and in accordance with reasonable commercial standards. It was stated that, while subjecting any modification of the original contract to the consent of the assignee might be appropriate in some cases (e.g. where the receivables assigned might have been fully earned and the assignment had been notified to the debtor), it would produce undesirable results in other cases (e.g., in the context of long-term contracts). In the latter cases, it was observed, it might be overly burdensome for the assignor to have to seek the assignee's consent for every modification (e.g.,

replacement of equipment). In addition, it was pointed out that the assignee might not wish to be burdened with such requests. It was explained that in practice such problems were being resolved through an agreement between the assignor and the assignee as to what types of modifications were subject to the approval of the assignee. Moreover, it was observed that paragraph (2) was predicated on the assumption that there was no such agreement between the assignor and the assignee, or that the assignor breached that contract, in which case paragraph (2) provided an adequate level of protection to the assignee.

203. After discussion, the Working Group failed to reach agreement and requested the Secretariat to prepare a revised version of paragraph (2) with variants reflecting the views expressed.

Paragraph (3)

204. While some support was expressed in favour of retaining paragraph (3), the prevailing view was that it should be deleted. It was observed that, in case of a modification of minor importance, a second notification would be unnecessary and might have the unintended result of increasing the cost of financing, in particular in transactions involving the assignment of a large number of low-value receivables. In addition, it was stated that, in case of a substantial modification amounting to a new assignment, a second notification would be necessary, by virtue of draft articles 4 and 16, even if paragraph (3) were to be deleted. In order to clarify the latter point, it was agreed that reference should be made in draft article 15(1) to the notification of "the assignment or its modification". Subject to that modification of draft article 15(1), the Working Group decided to delete paragraph (3).

Article 19. Waiver of defences and set-offs of the debtor

205. The text of draft article 19 as considered by the Working Group was as follows:

> "(1) [Without prejudice to [the law applicable to the relationship between the assignor and the debtor] [consumer-protection law],] the debtor may agree with the assignor or the assignee in writing to waive the defences and set-offs that it could raise under article 17. A waiver of defences and set-offs precludes the debtor from raising against the assignee those defences and set-offs.
>
> "(2) The following defences may not be waived:
>
> "(a) defences arising from separate dealings between the debtor and the assignee; and
>
> "(b) defences arising from fraudulent acts on the part of the assignee [or the assignor].
>
> "(3) A waiver of defences may only be modified by a written agreement."

Title

206. As a matter of drafting, it was suggested that language along the lines "agreement not to raise defences" might be used instead of the term "waiver", which could be misunderstood as referring to a unilateral act and one that did not require written form.

Paragraph (1)

207. The Working Group first considered the text in square brackets ("[Without prejudice to [the law applicable to the relationship between the assignor and the debtor] [consumer-protection law],]"). General preference was expressed in favour of a reference to consumer-protection law. It was generally felt that such a reference was needed to address the concerns expressed at the previous session of the Working Group with regard to the potential conflict between draft article 19 and the applicable consumer-protection law (A/CN.9/432, paras. 234-238). In addition, it was pointed out that a reference to the law applicable to the relationship between the assignor and the debtor was not appropriate since the draft Convention covered at least some aspects of that relationship.

208. As a matter of drafting, a number of suggestions were made, including that: the reference to consumer-protection law could be usefully supplemented by a clarification that the consumer-protection law applicable in the country in which the debtor had its place of business was meant; and that a more general formulation could be found in order to accommodate those countries that did not have any specific consumer-protection law. Subject to suggestions, the Working Group decided to delete the reference to "the law applicable to the relationship between the assignor and the debtor" and to retain the reference to "consumer-protection law".

209. The Working Group next turned to the question whether paragraph (1) should cover only waivers agreed upon between the assignor and the debtor, or also waivers agreed upon between the assignee and the debtor. It was generally agreed that waivers agreed upon between the assignee and the debtor should be left entirely to the discretion of the parties. It was observed that the limitations contained in paragraph (2) would be inappropriate in the context of the assignee-debtor relationship, in view of the possibility that the debtor might be able to obtain benefits by negotiating a waiver of defences with the assignee. After discussion, the Working Group decided that the reference to the assignee in paragraph (1) should be deleted and requested the Secretariat to prepare a revised draft of paragraph (1) to reflect the above-mentioned decisions.

Paragraph (2)

Subparagraph (a)

210. Some doubt was expressed as to whether subparagraph (a) should be retained. It was observed that a waiver of defences arising from separate dealings between the assignee and the debtor should be left to the discretion of the parties. After discussion, the Working Group decided to retain subparagraph (a) within square brackets.

Subparagraph (b)

211. Broad support was expressed in favour of retaining subparagraph (b). The suggestion was made that further defences that might not be waived should be listed along the lines of article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"). It was stated that one of the possible objectives of the draft Convention might be that receivables should be treated, to a large extent, like negotiable instruments. Accordingly, it was suggested that the draft Convention should afford the debtor the same protection afforded by the Bills and Notes Convention to the obligor in the context of a negotiable instrument. After discussion, the Working Group adopted subparagraph (b) unchanged and requested the Secretariat to consider including in paragraph (2) further defences along the lines of those listed in article 30(1)(c) of the Bills and Notes Convention.

Paragraph (3)

212. Broad support was expressed in favour of paragraph (3). It was pointed out that a requirement of written form for the waiver of defences was in the interest of certainty and predictability. In addition, it was stated that, if an assignee who extended credit in reliance on a waiver of the defences of the debtor were to find out that that waiver had been modified by the assignor and the debtor, certainty would be compromised and such a result might have an adverse impact on the availability and the cost of credit. In order to avoid that result, the suggestion was made that the modification of the waiver might need to be notified to the assignee. However, strong concerns were expressed with regard to introducing yet another requirement as to form. It was recalled that the Working Group had agreed that assignment and notification would have to be in writing and that the draft Convention's acceptability might be reduced if it were to be perceived as following an overly formalistic approach. After discussion, the Working Group adopted paragraph (3) unchanged.

Article 20. Recovery of advances

213. The text of draft article 20 as considered by the Working Group was as follows:

> "Without prejudice to the debtor's rights under articles 4(2) and 17, failure of the assignor to perform the original contract, if any, does not entitle the debtor to recover a sum paid by the debtor to the assignee."

214. The Working Group found the substance of draft article 20 to be generally acceptable. It was noted that, after the decision of the Working Group to delete draft article 4(2) (see para. 94), the reference to that provision should be deleted on the understanding that the assignment did not prejudice the rights of the debtor against the assignor.

215. The suggestion was made that language along the lines of the opening words of draft article 19(1) as revised (see paras. 207-208) should be inserted at the beginning of draft article 20 as well. It was pointed out that, under certain consumer protection laws, the debtor might have a right to terminate the original contract and that, in such a case, the debtor might have a right to recover advances made to the assignee. Subject to that suggestion, the Working Group adopted draft article 20.

Article 21. Rights of third parties

216. The text of draft article 21 as considered by the Working Group was as follows:

> "(1) Except as provided in articles 22 to 24, this Convention does not affect the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor.
>
> "(2) Notwithstanding articles 22 to 24, this Convention or the general principles on which it is based do not govern:
>
> > "(a) any right of creditors of the assignor attaching the assigned receivables to invalidate the assignment as a fraudulent transfer;

"(b) any right of the administrator in the insolvency of the assignor to invalidate the assignment as a fraudulent or preferential transfer;

"(c) the priority of the insolvency administrator for the benefit of privileged claims."

217. It was noted that draft article 21 was intended to function as an introduction to draft articles 22 to 24, which reflected the extent to which the draft Convention might affect the law applicable to the rights of third parties, including the creditors of the assignor in case of insolvency. Draft article 21 stated the rule that the draft Convention did not affect the rights of third parties and went on to list the exceptions to the rule set forth in draft articles 22 to 24. It was generally agreed that such exceptions, while they were necessary to provide minimum safeguards to the markets concerned, should be defined narrowly, so as not to compromise the acceptability of the draft Convention by interfering with national laws governing insolvency. As a matter of drafting, it was suggested that, to the extent possible, the provisions of draft articles 21 and 24 dealing with issues of insolvency might need to be combined as one single set of rules.

Paragraph (1)

218. The view was expressed that the words "this Convention does not affect the rights of the assignees" were insufficiently reflective of the policy that the rules of law applicable outside the draft Convention with respect to the matters specified in paragraph (1) should prevail over the draft Convention. It was suggested that wording along the following lines might be substituted for paragraph (1): "Except as provided in articles 22 to 24, the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor are settled by the law governing insolvency".

219. With respect to the words "this Convention does not affect the rights of the assignees receiving the same receivables from the assignor", the view was expressed that, as currently drafted, paragraph (1) might be misinterpreted as placing all situations involving rights of several assignees outside the scope of the draft Convention. It was generally felt that paragraph (1) might need to be redrafted to indicate more clearly that the rights of each of the several assignees would be governed by the draft Convention and that the issues of competing rights of several assignees would be dealt with by draft article 22. After discussion, the Working Group approved the substance of paragraph (1) and requested the Secretariat to prepare a revised draft of paragraph (1), reflecting the above suggestions.

Paragraph (2)

220. It was noted that paragraph (2) listed some fundamental rights of third parties, which involved public policy considerations and which the draft Convention should not attempt to address. Those rights included: the right of individual creditors of the assignor to challenge the validity of assignments as a fraudulent transfer; the right of the administrator in the insolvency of the assignor to invalidate assignments as fraudulent or preferential transfers; and the priority of privileged claims (e.g., of the State for taxes and of employees for salaries and similar benefits).

221. While it was stated that the intended effect of paragraph (2) might implicitly flow from the operation of draft articles 22 to 24, it was generally agreed that a provision along the lines of paragraph (2) was needed to make it clear that the issues listed in subparagraphs (a) to (c) were left to the law applicable outside the draft Convention, and thus were not dealt with by draft articles 22 to 24.

Opening words

222. Differing views were expressed as to the question whether the reference to "the general principles" on which the draft Convention was based should be retained or deleted. One view was that such a reference was needed to make it clear that the general statement contained in draft article 6(2) with respect to the general principles on which the draft Convention was based (e.g., the observance of good faith in international trade) could not be regarded as entailing the application of the draft Convention under draft article 21 (e.g., in the case of fraudulent transfers dealt with in subparagraphs (a) and (b)). The prevailing view, however, was that the reference to the general principles on which the draft Convention was based should be deleted from draft article 21, since paragraph (2) was dealing with matters not governed by the draft Convention. After discussion, the Working Group decided that the words "or the general principles on which it is based" should be deleted.

Subparagraph (a)

223. The Working Group found the substance of subparagraph (a) to be generally acceptable. As to the scope of the provision, it was generally felt that there was no need for a restriction to those creditors of the assignor that "attached the assigned receivables". Rather, the provision should be equally applicable to all creditors of the assignor who might have a "right to invalidate the assignment as a fraudulent transfer". The Working Group decided that the words "attaching the assigned receivables" should be deleted.

224. As a matter of drafting, it was agreed that the reference to "the right of creditors of the assignor to invalidate the assignment" might need to be rephrased to avoid creating the implication that the creditors of the assignor could directly invalidate the assignment. It was pointed out that, in most legal systems, the creditors of the assignor could only challenge the validity of the assignment, while the actual invalidation could only result from a decision by a court of justice. After discussion, the Working Group approved the substance of subparagraph (a) and requested the Secretariat to prepare a revised draft, reflecting the above-mentioned decisions.

Subparagraph (b)

225. The text of subparagraph (b) was found to be generally acceptable, subject to a modification along the lines adopted with respect to subparagraph (a) to avoid creating the impression that the administrator in the insolvency could, on its own authority, "invalidate" an assignment (see para. 224).

Subparagraph (c)

226. The Working Group found the substance of subparagraph (c) to be generally acceptable. However, the view was expressed that, while subordinating the rights of the assignee to the rights of holders of privileged claims was appropriate in case of an assignment by way of security, it might not be appropriate in case of an assignment by way of sale. It was stated that, in many legal systems, receivables assigned as security for indebtedness or other obligations before the opening of insolvency proceedings were included in the insolvency estate and were thus subject to privileged claims, while receivables sold were not part of the insolvency estate and should not be subordinated to privileged claims. For that purpose, it was suggested that a distinction should be drawn between assignments by way of sale and assignments by way of security. In support, it was observed that drawing such a distinction might be helpful for those countries where domestic law did not sufficiently recognize the

actual sale of receivables and would accommodate significant practices, such as securitization, which involved sales of receivables. That suggestion was objected to on the ground that it would be inappropriate to attempt to introduce such a distinction, particularly in view of the numerous factual situations where it would be difficult to establish whether, in fact, the assigned receivables were used as security or were sold. It was recalled that, at its previous sessions, the Working Group had avoided to draw such a distinction since it found it to be problematic (A/CN.9/420, paras. 39 and 95 and A/CN.9/432, paras. 46 and 257).

227. After discussion, the Working Group approved the substance of subparagraph (c) and requested the Secretariat to add the words "where the assigned receivables constitute security for indebtedness or other obligations" between square brackets at the end of subparagraph (c) for consideration at a future session.

Future receivables

228. Differing views were expressed as to whether the effectiveness of the assignment of receivables not existing at the time of the commencement of the insolvency proceedings should be governed by the draft Convention.

229. One view was that the matter should be left to national law. It was stated that receivables arising, becoming due or being earned by performance after the commencement of the insolvency proceedings were considered, in many legal systems, to be part of the insolvency estate. In addition, it was observed that: such receivables would normally be performed, if at all, by using value of the insolvency estate; and that the assignee would be unlikely to extend credit before, full or partial, performance of the original contract by the insolvency administrator on behalf of the assignor. Therefore, it was said, it would not be appropriate to remove those receivables from the insolvency estate or to give priority with regard to those receivables to the assignee over unsecured creditors. In line with that view, the suggestion was made that wording along the following lines should be inserted in paragraph (2): "the right of the administrator in the insolvency of the assignor to challenge the assignment of receivables that were future at the time of the commencement of the insolvency of the assignor".

230. That suggestion was objected to on the ground that, once the draft Convention established the effectiveness of assignments of future receivables in draft article 8, it would be inappropriate to exclude from such a fundamental rule the most important cases in which such assignments needed to be validated, namely cases involving insolvency. It was observed that, under the laws of many countries, such an assignment would be effective only if it had taken place before the opening of a certain period, sometimes referred to as the "suspect period", before the commencement of the insolvency proceedings. In addition, it was observed that, in view of the uncertainty prevailing in some legal systems as to the effectiveness of assignments of future receivables, it was of importance for the draft Convention to validate them. With a view to reflecting those observations, it was suggested that a provision determining the date of assignment might need to be introduced either in a separate paragraph of draft article 21 or in draft article 24, since it might need to be phrased as a positive rule under the draft Convention and not as an exception.

231. In the discussion, the view was expressed that it might be useful for the draft Convention to contain more detailed provisions on the issues of assignment of future receivables in the context of insolvency proceedings, since the draft Convention might have the opportunity to fill lacunae in many existing insolvency laws. It was widely felt, however, that, to the extent possible, the draft

Convention should avoid interfering with domestic insolvency law, which might affect the acceptability of the draft Convention.

232. After discussion, the Working Group failed to reach agreement and requested the Secretariat to introduce wording within square brackets in draft article 21 and in draft article 24, reflecting the above-mentioned views for continuation of the discussion at a future session.

Other proposed additions to paragraph (2)

233. The Working Group next considered a number of suggestions with respect to the treatment of other insolvency-related issues under the draft Convention, for possible addition in paragraph (2) or elsewhere in the text.

234. One suggestion was that there should be a general rule that an assignee under the Convention should be treated no less favourably than a similarly situated assignee under domestic law. For example, if an assignee who had complied with provisions of domestic law to obtain priority over attaching creditors or an insolvency administrator would be treated in a certain way under domestic law, then an assignee who had complied with the provisions of the draft Convention to achieve that same priority should be treated at least as favourably. It was suggested that a rule of non-discrimination in national treatment would establish a minimum safeguard for assignees under the draft Convention. Broad support was expressed in favour of that suggestion.

235. Another suggestion was that paragraph (2) might need to further clarify that the draft Convention deferred to national laws on transfers that were fraudulent under national laws. Yet another suggestion was that the draft Convention might need to defer to national law certain questions relating to substantive insolvency law, such as: whether an assignment might be set aside as preferential, and whether an assignment of receivables that existed but were not earned by performance, fully or partially, at the commencement of the insolvency might be encumbered with the expenses of the insolvency administrator in performing those receivables for the benefit of the assignee.

236. A further suggestion, relating to procedural insolvency rules, was that, at least in the case where the assigned receivables were used as security for indebtedness or other obligations, the draft Convention should defer to national insolvency laws relevant to the following issues: whether assignees and creditors were stayed in the insolvency from collecting, applying or enforcing their security; whether the insolvency administrator might use the assigned receivables to operate the insolvency estate if the insolvency administrator provided replacement security to the assignee; whether the insolvency administrator might borrow against the assigned receivables to the extent that the value of the assigned receivables exceeded the obligations secured; and whether the assigned receivables might be charged by the insolvency administrator with privileged claims (e.g., taxes and wages). It was suggested that, if the Working Group were to decide that the assigned receivables might be charged with privileged claims, the Working Group might also wish to consider another anti-discrimination principle, namely, that the assignee's security would have to be charged fairly and equitably with other security that might also be charged with privileged claims.

237. The Working Group took note of the above-mentioned suggestions and requested the Secretariat to introduce, to the extent possible, wording within square brackets in draft article 21 or draft article 24, reflecting those suggestions.

Article 22. Competing rights of several assignees

238. The text of draft article 22 as considered by the Working Group was as follows:

"(1) Where a receivable is assigned by the assignor to several assignees, priority is determined on the basis of time of [notification] [registration] of the assignment.

"(2) [If no assignee registers the assignment, priority is determined on the basis of the time of notification of the assignment.] If no assignee notifies the debtor, priority is determined on the basis of the time of assignment."

Paragraph (1)

239. Differing views were expressed as to whether an assignee who had complied with the priority rule of the draft Convention would prevail over an assignee who had complied earlier with the priority rule existing under national law. It was noted that the question could arise in case the two priority rules differed and a conflict arose between a foreign and a domestic assignee of domestic receivables.

240. One view was that the draft Convention should establish a priority rule that would address all possible conflicts of priority among several assignees. It was stated that, if an assignee having complied with the priority rule of the draft Convention were to find itself subordinated to an assignee who had not complied with the draft Convention, the draft Convention would fail to achieve its goal of enhancing certainty and predictability as to the rights of third parties. As a result, it was said, the draft Convention would fail to increase the availability of lower-cost credit.

241. In addition, it was observed that failure to provide priority for a "Convention assignee" over an earlier "non-Convention assignee" would render the draft Convention ineffective in the world market. It was pointed out that, if all national priority systems were to prevail over the draft Convention, the uncertainty currently existing would remain, which would seriously compromise the usefulness of the draft Convention. It was stated, however, that, while it would be desirable to include in the draft Convention a rule covering all conflicts of priority, failing to do so would somehow reduce but not defeat the usefulness of the draft Convention.

242. Another view was that conflicts of priority between foreign and domestic assignees of domestic receivables should not be covered. Granting priority to a foreign assignee (whose claim resulted from an assignment made later in time under the draft Convention) over a domestic assignee (whose claim resulted from an assignment made earlier in time under domestic law) could upset domestic financial markets. In response, it was observed that domestic assignees could be protected if they were to meet the requirements of the priority rule to be established by the draft Convention.

243. After discussion, the Working Group failed to reach agreement and requested the Secretariat to prepare a revised draft of paragraph (1), with possible variants, taking into account the views expressed.

244. The Working Group noted that, in the context of its discussion on draft article 3, the definition of "priority" had been reserved for future deliberation (see para. 85). However, for lack of sufficient time, the Working Group deferred its discussion of the definition of the term "priority" to a future session.

245. The Working Group next turned to the question of the basis for determining priority among several conflicting assignees (i.e., which party "had the right to receive payment of the receivables first in preference to other parties" under draft article 3(8)). It was noted that "priority" did not involve the validity of the assignment but rather the question as to which party would receive payment first, provided that it had a valid claim. Whether the party with priority would retain all the proceeds of payment or turn over any remaining balance after the satisfaction of its claim to the next party in line of priority depended on whether an assignment by way of sale or an assignment by way of security was involved, a matter left to other applicable law.

246. One view was that priority should be determined on the basis of the time at which the assignment was made. It was stated that such a rule would be consistent with the approach followed in draft article 8 with regard to the time of transfer of receivables. In addition, it was observed that such an approach would be in line with the rules followed, in many legal systems, with regard to the transfer of property. Moreover, while it was recognized that such an approach would afford very little or no protection to third parties, it was pointed out that there was no need to protect third parties over the first assignee in time. It was explained that good faith acquisition of rights in the assigned receivables by third parties could not be established and should, therefore, not be recognized.

247. It was observed that the crucial question related to the evidential way in which priority in time could be established. In order to address that question, the suggestion was made that a rule could be devised providing that the assignee who first registered, or, alternatively, notified the debtor would be presumed to be the first assignee in time. Any other assignee, who claimed to be the first assignee in time, would need to bear the burden of providing sufficient evidence of its priority.

248. It was stated that, in those legal systems that addressed issues of priority based on the time of the assignment, confidentiality of the financing transaction was a consideration of paramount importance and that any other approach would unduly interfere with well established non-notification finance practices. In addition, it was stated that the need for publicity of assignments was very limited and that, therefore, only limited information should be available and only to banks. In opposition to that view, it was pointed out that a publicity system would not necessarily interfere with non-notification finance practices since the identity of the debtor did not need to be disclosed in the notice to be filed and that such a notice would not be sent to debtors. In addition, it was observed that a publicity system accessible only to banks, and not to all potential providers of credit, would fail to create certainty as to the rights of third parties and to generate new credit.

249. Another view was that priority should be determined on the basis of the time of notification of the debtor. It was observed that third parties should be able to obtain information about possible earlier assignments from the debtors. While it was accepted that such an approach could work well in the context of the assignment of small numbers of existing receivables, it was pointed out that notification of the debtor might not be an efficient or feasible way of determining priorities in case of bulk assignments of present and future receivables. It was explained that a number of difficulties would arise, including that: the identity of the debtors would not be known; the cost and time involved in notifying a significant number of debtors would be substantial; and third parties would be faced with the task of having to enquire about the status of the receivables with all those debtors, who would be under no obligation to respond.

250. Yet another view was that priority should be determined on the basis of an adequate publicity system, which should allow third parties a considerable degree of certainty and predictability as to whether they would be able to rely on receivables in deciding to extend credit. It was recalled that,

at its previous session, the Working Group generally felt that the principal rule for determining priority should somehow provide for the publicity of the assignment, so as to avoid practical difficulties with respect to evidence of the various assignments involved (A/CN.9/432, para. 247). In addition, it was stated that, in practice, financing institutions would not be prepared to extend credit if they were unable to calculate the risk that another creditor might have priority, which would be the case in the absence of an adequate publicity system.

251. As to the specific type of the publicity system to be adopted, it was pointed out that, in order to avoid confusing a system aimed at resolving conflicts of priority among several assignees with the typical real estate registration, the term "notice filing system" should be used instead of the term "registration". It was explained that the basic difference was that filing of a notice about the assignment, as opposed to registering rights in real estate, was not a condition for the validity of the assignment, but only a condition for determining priority.

252. In addition, the view was expressed that whether the assignee with priority would retain the proceeds of the receivables depended on whether an assignment by way of sale or an assignment by way of security would be involved, which was left to other applicable law. Moreover, it was stated that, while a single international registry could be envisaged, other alternatives would include a combination of national filing systems and an international registry, or database. Such a filing system, if fully or partly computerized, would be time- and cost-efficient and reliable in filing, storing and accessing information filed. In that regard, the concern was expressed that establishing an electronic filing system might create difficulties for countries that did not have the necessary technology to implement it. On the other hand, it was observed that, without such a publicity system, the draft Convention would fail to generate new credit from bulk assignments for emerging markets.

253. After discussion, the Working Group failed to reach agreement and requested the Secretariat to prepare a revised version of paragraph (1), reflecting the views expressed.

Paragraph (2)

254. The Working Group decided to defer its discussion of paragraph (2), pending further consideration of paragraph (1).

Article 23. Competing rights of the assignee and the assignor's creditors

255. The text of draft article 23 as considered by the Working Group was as follows:

"The assignee has priority over creditors of the assignor attaching the assigned receivables, if:

"(a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before attachment; or

"(b) the assignee has priority under the law governing attachment."

256. It was noted that, under draft article 23, an assignee could establish priority over creditors of the assignor attaching the assigned receivables by meeting the test set forth in subparagraph (a) or by complying with the law governing attachment. Subparagraph (a) presented two alternatives. Under the first alternative, the assignee would prevail, if a particular event (i.e., conclusion of the

assignment or the original contract, maturity of the receivable or performance of the original contract) had taken place before the attachment; under the second alternative, in addition to a particular event, a publicity requirement (i.e., notification or registration) would need to be met before the attachment for the assignee to establish its priority.

257. In addition, it was noted that minimum interference with the rights of the assignor's creditors under the law governing the attachment would be achieved by a rule based on the time the receivables were earned by performance. Moreover, it was noted that such an approach would normally not undermine the protection of the assignee, since in practice assignees tended to extend credit upon, at least partial, performance of the contract from which the receivables would arise.

258. While some support was expressed for adopting a rule based on the time of assignment, for the same reasons that approach was supported in the context of draft article 22(1) (see paras. 246-248), the Working Group, for lack of sufficient time, deferred consideration of draft article 23 to a future session.

IV. FUTURE WORK

259. Having exhausted the time available for deliberations at the current session, the Working Group deferred consideration of draft articles 24 to 25 to a future session and requested the Secretariat to revise draft articles 24 to 25, taking into account the deliberations and decisions of the Working Group on draft articles 1 to 23.

260. A number of issues were suggested for consideration during the upcoming deliberations of the Working Group. Those included: the question of which party needed to be in a contracting State for the draft Convention to apply; the problems resulting from the tentative decision to cover assignments of non-contractual receivables; the mandatory or non-mandatory character of individual provisions of the draft Convention; questions of conflicts of priority, including conflicts between a foreign and a domestic assignee of domestic receivables; insolvency-related issues; and conflict-of-laws issues.

261. In connection with the above-mentioned issues, reference was made to the utility of information, in particular regarding the experiences and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group by the Secretariat, as well as by the members of the Working Group themselves as a result of consultations.

262. With regard to the conflict-of-laws issues, the Working Group decided that they should be addressed at the beginning of the next session of the Working Group on the basis of a revised version of the conflict-of laws rules contained in document A/CN.9/WG.II/WP.87, to be prepared by the Secretariat, taking into account the comments of the Permanent Bureau of the Hague Conference on International Private Law (A/CN.9/WG.II/WP.90) and of other experts in the field of conflict-of-laws.

263. It was noted that the next session of the Working Group was scheduled to be held in New York from 23 June to 3 July 1997, those dates being subject to confirmation by the Commission at its thirtieth session.

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